









REPORTS OF CASES

DECIDED

IN THE

COURT OF COMMON PLEAS

OF

UPPER CANADA;

FROM TRINITY TERM, 13 VICTORIA, TO EASTER TERM, 14 VICTORIA.

BY

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BARRISTER-AT-LAW.

VOLUME I.

SECOND EDITION.

TORONTO :

HENRY ROWSELL,

KING-STREET.

1869.

THE HISTORY OF THE

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J U D G E S
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD OF THESE REPORTS.

THE HON. JAMES BUCHANAN MACAULAY, *Chief Justice.*

“ “ ARCHIBALD McLEAN.

“ “ ROBERT BALDWIN SULLIVAN.

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REPORTS OF CASES
IN THE
COURT OF COMMON PLEAS,
TRINITY TERM, 13 VIC.

Present :

The HON. J. B. MACAULAY, C. J.

“ “ MR. JUSTICE McLEAN.

“ “ MR. JUSTICE SULLIVAN.

THE MARMORA FOUNDRY COMPANY V. MURNEY.

Demurrer.—Sufficiency of declaration for calls under the statute 1 Wm. IV., chap. 12.

Declaration dated 22nd April, 1850.

Writ issued 10th April, 1850.

Declaration in debt for £75. The first count of the declaration states that before the election of directors, and before the commencement of the suit—to wit, on the 1st November, 1848—the defendant subscribed for, and became, and was, and then was the owner and holder of divers (to wit, 20) shares of the capital stock of the Marmora Foundry Company, each share being of the value of £12 10s., and in all £250, and which became due and payable to the plaintiffs, as follows : that is to say, ten per cent. on each of the said shares, immediately after the stockholders of the said company should elect the number of directors after mentioned, and the remainder by instalments of not more than ten per cent. upon the amount of each share, at such periods as the president and directors of the said company should from time to time direct and appoint ; provided that none of the said last-mentioned instalments should be called for by the plaintiffs in less than forty days after public notice should

have been given of such call in the *Upper Canada Gazette*, and in some two or more newspapers published in the then Midland District ; that afterwards—to wit, on the 18th of November, 1848—the sum of £20,000 of the capital stock being then subscribed for, the subscribers called a meeting at the court house in Belleville, on the 27th of December, 1848, for electing the number of directors of the said company above mentioned, and of which notice was given and published in the *Upper Canada Gazette*, and in two newspapers printed in the Midland District, and in two newspapers printed in the Victoria District, on the 18th November, 1848, thirty days previous to such meeting ; that afterwards—to wit, on the 27th December—a meeting of the said stockholders was held at the place appointed, who then and there elected five directors of the said company of the said stockholders eligible, &c., whereupon the said 10 per cent. first above mentioned on each of the said twenty shares—to wit, 25s. on each share, in all £25, parcel of the said £75—became due and payable from defendant to plaintiffs, whereby an action had accrued, &c.

The 2nd count of the declaration further states, that after the said subscription for the said stock, and after the election of directors as above stated, and before the commencement of this said suit, and while defendant continued such stockholder in the said company, and so liable upon the said stock as first above mentioned—to wit, on the 20th of April, 1849—the president and directors of the said company did, according to the powers in them vested by the act incorporating the plaintiffs, and in due form according to law, direct and appoint that an instalment of 10 per cent. upon each share of the said stock so held and owned by the defendant as aforesaid should become due and payable from the defendant to the plaintiffs on the 15th of June then next, at the office of the Bank of Montreal, in Belleville aforesaid ; of which call public notice, according to law and to the requirements of the said act of incorporation, was duly given by the plaintiffs—to wit, on the 1st of May in the year last aforesaid—in the *Upper Canada Gazette*, and also in the *Chronicle and News*, and in the *British Whig*, two newspapers pub-

lished in the then Midland District, and in the *Intelligencer* and *Victoria Chronicle*, two newspapers published in the then Victoria District—to wit, forty days before the day and period upon which the said instalment was so appointed and directed to be paid as aforesaid, and thereupon and by force of the statute in that behalf, the said instalment, amounting, to wit, to the sum of £1 5s. on each share, in all to £25, (parcel of the said sum of £75 above demanded,) became due and payable from the defendant to the plaintiffs—whereby an action hath accrued to the plaintiffs to demand of and from the defendant the said sum of £25, parcel, &c.

3rd count of the declaration, similar to the 2nd count, for another call of 10 per cent., alleged to have been made on the 25th September, 1849, to be paid on the 10th of November then next, at the place mentioned in 2nd count and duly advertised in the newspapers in the said 2nd count mentioned, being similar to the 2nd count, and stating in addition, that although the said sum of £25 in the said second and last count mentioned, were respectively due and payable before the commencement of this suit, yet defendant, although requested, hath not paid the said sum of £75 above demanded, or any part thereof, to the plaintiffs damage of £50, &c.

Demurrer to 2nd and 3rd counts—similar grounds being separately assigned to each, viz. :

1st and 2nd grounds of demurrer, abandoned on argument.

3rd. That in the said counts the plaintiffs have attempted to set out the requirements of the act 1 Wm. IV. c. 12, and have only set out, or stated, the subscription of the stock, and calling a meeting to elect directors ; but have not set out all that is required by said act, prior to the subscription for stock and the election of directors, such as the opening of the books, under the authority of a majority of the petitioners mentioned in such act, and the places where, and times when, such books were opened, and under whose direction or authority—or that books were opened for the subscription of stock under the said act, under the authority of the said petitioners, by any person or persons designated, named or

appointed by them, or a majority of them, to open such books.

4th. That no sufficient cause of action is shewn by the said 2nd (and 3rd) counts, to enable the plaintiffs to recover against the said defendant under the said act, as the said act does not expressly contain any provision authorising the said company to sue without setting out the special matter or requirements contained therein, necessary to sustain the cause of action in the said 2nd (and 3rd) counts.

5th. That it is not stated that the money therein mentioned and sought to be recovered by the plaintiffs from the defendant, is sued for or become due and payable under and by virtue of the said act, nor is the said act sufficiently set forth to enable the plaintiffs to recover.

6th. That the plaintiffs not having set forth the requirements of the act antecedent to the subscription of stock and election of directors, before the said company could be legally formed, places defendant in such a position that he cannot by pleading controvert or deny the legal formation of the said company, as such facts are not therein (*i.e.*, in the 2nd and 3rd count) alleged and set forth.

7th. That it is not shewn that the defendant is a stockholder in the said Marmora Foundry Company, and therefore cannot be sued by the said company in any matter respecting the stock or effects of the said company.

8th. That in said counts it is alleged that the said instalments became due and payable from the defendant to the plaintiffs on the days mentioned, at the office of the Montreal Bank at Belleville, and it is not averred or shewn that the said instalments were not paid at such office at the times appointed, &c.

Plaintiffs join in demurrer.

Eccles, in support of the demurrer, contended—

1st. That the inducement to the 1st count cannot be referred to, in aid of the 2nd and 3rd counts, and that not being a general inducement to the whole declaration, the 2nd and 3rd counts do not sufficiently refer thereto to connect it with them, even if that were admissible, and that they are therefore imperfect.

2nd. That the previous proceedings required by the act constituted conditions precedent to the plaintiffs' right to sue, and should have been set out; that the act does not (like many others) enable the plaintiffs to declare generally, therefore the declaration should have been special, and should aver the performance of all the conditions specially—such as opening the books of subscription within two months, &c.; that notice of the appointment of directors should have been alleged, and it should further have averred that there are directors at present, which it has not done; also, that Hetherington had conveyed the Marmora property to the plaintiffs, and that he joined in forming the company, being one of the three petitioners to parliament named in the recital of the act.

Hagarty, for the plaintiffs, objected that several of the latter objections were not suggested as grounds of demurrer, and could not now be raised for the first time; that defendant being a stockholder, was bound to take notice of the proceedings, and that the two counts demurred to, contained sufficient statements to support the action, the principal points to be stated being, that the defendant was a shareholder, and that the calls were made, for, if so, the defendant was liable; that it is shown that the corporation went into operation as a company, under the statute, and that calls were made and published as the act required, and of which the defendant thereby had notice, such calls being made by the directors *de facto*, and that it was not essential to show or aver them to have been such *de jure*, although the plaintiffs are not empowered to declare generally, enough as stated, under any rule of pleading, to show compliance with all material and essential steps that can be regarded as conditional, and not merely directory provisions.—6 U. C. R. 567.

MACAULAY, C. J.—The attention of the court, since the late rules—H. T. 13 V. No. 27, p. 9,—must be confined to the grounds of demurrer regularly stated—that is, to those specially assigned on the face of the demurrer. The first and second grounds of demurrer having been abandoned, the first point is whether the 2nd and 3rd counts show a

sufficient compliance with the statute of incorporation ; and as it contains no special provisions respecting the form of declaring, it is necessary to distinguish carefully between what is merely directory therein, and that which is strictly conditional. The statute 1 Wm. IV., c. 12, after providing in section 1 for the formation of the company, enacts in section 3 that books of subscription shall be opened within two months after the passing of the act ; where, when and by such person or persons, and under such regulations as the majority of the petitioners shall direct and appoint. This I consider a provisional and directory, and not a conditional clause, for I do not think it necessary to the scope and spirit of the act to hold that the company could never be formed unless books were opened within the period specified. The non-election of directors would not dissolve the company when once formed, (by sec. 9,) and the not opening of subscription books within two months, should not for ever preclude its formation.

The opening of books was a necessary preliminary to there being subscribers for stock therein, but the duties of the three petitioners on that subject were in a great measure, if not purely, ministerial. It was not required of them that they should become stockholders or subscribers for shares, or acquire any personal interest in the company, merely that books should be opened under their direction. The first steps towards the organization of the company were entrusted to them, the original projectors of, and applicants therfor, and the interest of Hetherington in the Marmora iron works, as recited, accounts for the use made of his name. The more general objection is, that it is not averred that any books were ever opened, or that any were opened under the petitioners or a majority of them, or in what books, or in what manner the defendant subscribed or became a subscriber for stock ; it is, however, averred that he subscribed for, and became, and was, and still is the owner and holder of divers shares of the capital stock of the company ; and the meaning of the word "subscribed," as used in the statute, is explained by the case of the Thames Tunnel Company v. Sheldon (6 B. & C. 341 ; 9

D. & R. 278), and three railway cases (2 B. 649). It is not necessary for the plaintiffs to aver more than they have done—namely, that the defendant subscribed for and became the holder and owner of shares, &c. The declaration in 4 U. Canada R. 309, is framed much in the same form as the present. The opening of books is a matter of evidence, rather than of substantive averment. It is alleged that the defendant subscribed and became the owner and holder of shares—this (if sufficiently averred) is admitted by the demurrer. Had the defendant denied by plea that he had subscribed, or was the owner or holder of shares, the onus would be upon the plaintiffs to prove the affirmative, and when it was shewn in evidence how the defendant had become a subscriber, the question of its validity as binding upon him, and proving him to be a shareholder, would arise. In my opinion, the averment in the declaration is sufficient. If books of subscription had not been opened, he could not have subscribed; the material fact to be alleged is, that he did subscribe, and became the owner and holder of stock; in what way he subscribed is matter of evidence. The condition precedent to his liability for calls is, that he should have subscribed for and become the owner and holder of stock; if he did, as is alleged, he is liable accordingly.

The only notice of calls required to be given is that prescribed by the statute. I find no authority requiring notice of the appointment of directors to be given to each stockholder, or for the averment that there were directors in office when the action was brought; the organization of the company being shewn, it is to be presumed that it continues until the contrary is shewn. On reference to the dates, it will be seen that the call stated in the second count was made during the time of the directors alleged to have been elected in December, 1848. The call mentioned in the third count was at a period subsequent to the first Monday in August, 1849; but it is averred to have been made by the president and directors of the company, which (if necessary to be averred at all) is a sufficient averment of there being directors then; and the action having been brought during

the time of such directors, it sufficiently appears that there were directors when the action was instituted, at all events that is to be presumed,—and if in fact there were none, it should be shown by the defendant.

It is not noted as a ground of demurrer that Hetherington should have been shown to have conveyed to the plaintiffs, nor is it necessary as a condition precedent to their right to sue for calls; the acquisition of Hetherington's estate therein is not indispensably necessary to their operations—a less interest may suffice.

The inducement to the first count may be properly incorporated in the second and third, by reference thereto, as made—see 4 M. & W. 243, 579.

Turning to the causes of special demurrer assigned, it appears:—

1. That it is not necessary to aver that books were opened by persons under the authority of a majority of the petitioners—that being matter of evidence, should the defendant deny his being a shareholder of the company under the statute.

2. That all necessary conditions are sufficiently averred.

3. That it is sufficiently averred that the moneys sued for became due and payable under the act, and that the act is sufficiently set forth to enable the plaintiffs to recover.

4. That the declaration is sufficient to enable the defendant to controvert the formation of the company, or to traverse any fact material to his liability as a shareholder.

5. That it is expressly averred that defendant is a stockholder, and sufficiently shown for the purposes of this action.

6. The general allegation of non-payment is sufficient. If the defendant did not pay at all, he did not pay at the time and place appointed, and a denial of payment generally includes a denial of payment at such time and place.

Looking at the statute, the proceedings and the defendant's subscription under it, as constituting a contract between the plaintiffs and defendant, the conditions on which his liability to pay was to arise were the election of directors after £20,000 should have been subscribed, and the due

making and publication of calls. These conditions are alleged to have been performed: the preliminary steps previous to the defendant's subscribing do not seem to be conditions precedent to his liability, any further than they are *prima facie* at least impliedly admitted by his own act in becoming a subscriber, although as matter of defence it may be open to him to plead that owing to some omissions or irregularities in the previous proceedings he did not, as a subscriber for shares, acquire the rights and privileges of a shareholder, and did not, therefore, incur the liabilities as such to the plaintiffs. This is not shown; and as respects conditions essential to be shown by the plaintiffs, I think the declaration contains all averments necessary to the maintenance of the action.

McLEAN, J.—In the act of incorporation, 1 William IV., ch. 2, the plaintiffs are authorised and empowered to sue, and are made liable to be sued, in all courts and places whatsoever, in all manner of actions, suits, complaints, matters and causes; and in the case of the plaintiffs against Ponton in this court, it was decided that they could sustain an action for the first instalment on stock subscribed, and payable, under the statute, immediately after the appointment of directors.

In this case, the plaintiffs seek to recover this first instalment, and also the amount of ten per cent., being two calls made by the directors under the provisions of the act of incorporation.

The first count for the instalment, which became payable, according to the statute, immediately on the election of directors, and for which a call was therefore unnecessary, sets out the various proceedings which took place in order to establish the company according to the requirements of the statute, and that count is not demurred to. The second and third counts, which are for calls made by the directors, do not contain any statement of such proceedings; but they allege that after the subscription of stock by the defendant, as *first above* mentioned, and after the election of directors as above mentioned, and before the commencement of this suit, and while the defendant continued to be such stock-

holder, and so liable upon the said stock, as *first* above mentioned, the president and directors of the Marmora Foundry Company did, according to the powers in them vested by the act of incorporation, and in due form according to law, direct and appoint that an instalment of ten per cent. on each share so held and owned by the defendant, *as aforesaid*, should become due and payable at certain specified periods, at the office of the Bank of Montreal, at Belleville; and each of the counts contains an averment, that due notice of the calls was published in certain specified newspapers in the Midland District and in the District of Victoria, forty days before the days and periods upon which the respective instalments mentioned in these counts were appointed and directed to be paid; and thereupon, and by virtue of the statute in that behalf made and provided, the several instalments upon the shares of the stock held by the defendant as aforesaid, amounting to a certain sum upon each call, became due and payable from the defendant to the plaintiffs, whereby an action hath accrued, &c. In the third count there is at the conclusion an averment, applying to the second and third counts, in these words:—"And although the said other sum of twenty-five pounds, further parcel, &c., in the second count mentioned, and the said sum of twenty-five pounds, residue, &c., in the last count mentioned, were respectively due and payable before the time of the commencement of this suit; yet the defendant, although often requested so to do, hath not paid the said sum of £75 above demanded, or any part thereof, to the plaintiffs' damage of £50.

To these counts the defendant demurs, and assigns for cause of demurrer those above mentioned in the judgment of the Chief Justice of this court.

The first and second grounds of demurrer were abandoned on the argument, but the objections to the third count are precisely the same as those to the second. With respect to the second ground—that plaintiffs do not in the second count set out the provisions of the act to be complied with before the corporation could by law exist—it appears to me not to be entitled to any weight. In the first count,

the formation of the company and all the preliminary proceedings for that object, are set out, and the subscription of the necessary amount of stock to entitle the stockholders to elect directors, in order that the company might go into operation; and the facts of such election, after due notice, are fully set forth, as well as the defendant's subscription for a certain number of shares of that stock. The second count refers to the first, and has a somewhat peculiar commencement, making it apparently a continuation of the first count. Instead of commencing in the most usual mode, "And whereas," &c., it commences with the words, "And the plaintiffs further say, that after the said subscription of the said stock by the defendant, as first above mentioned," &c.—thus coupling the statements in the first count with the second. But if it were otherwise, and if the formation, pursuant to the terms of the statute (4 M. & G. 552,) the corporation had not been contained in the first count, I incline to think the count would still have been good in commencing with the defendant's subscription for stock—leaving it to the defendant, in his pleas, to deny any particular facts necessary for the formation of the company. The defendant, though he might have subscribed for stock, could not by law be compelled to pay it until the sum of £20,000 required by the statute to be subscribed was actually subscribed for, and until the election of directors; and when sued, he might plead that the amount of £20,000 had not been subscribed; and on proof of that fact, he would be entitled to a verdict, as the election of directors would in such a case fall to the ground, and with it the existence of the company: or he might plead, if the fact were so, that there had been no election of directors, as, till such election, the company could not be organized, and there could be no one entitled to receive the instalments. In the argument, I understood it to be contended by the plaintiff that the defendant was estopped from denying the existence of the company from the fact of his having subscribed for a certain number of shares of its stock; but as the company could not be organized until a certain amount of stock was subscribed, the mere circumstance of the defendant subscribing stock for a

company which might never come into existence, could not estop him from denying that such company had come into existence. His liability must depend upon the terms of the statute being complied with by the subscription of the necessary amount of stock, and the subsequent election of directors; and of course the defendant must be at all times entitled to controvert these facts, whether alleged in the declaration or not. He is, however, I think, estopped from denying that the subscription books were opened at the proper time, and under the authority of the proper parties, even if the denial of these matters, which are directed by statute, could avail him. These observations apply to the third and fourth grounds of objection stated by the defendant, and shew, in my opinion, that they are as little entitled to prevail as those which precede them.

The fifth objection is not founded in fact. It alleges that there is no statement that the money sought to be recovered became due and payable under and by virtue of the act of incorporation: there is an express averment in each of the counts demurred to, that "thereupon and by force and virtue of the statute in that behalf made and provided, the several instalments became due and payable from the defendant to the plaintiffs, whereby an action hath accrued, &c.

As to the sixth ground of demurrer assigned by defendant, it is alleged in the first count that defendant subscribed for certain shares of stock of the company; and the statements in that count being particularly referred to, and engrafted as it were in the second and third counts, the defendant is sufficiently shewn to have become a stockholder, and liable to be sued for his instalments. The last objection—that it is not alleged that the instalments were not paid when due, at the office of the Bank of Montreal at Belleville, where the calls were required to be paid—appears also to be unfounded. At the conclusion of the declaration there is an express averment that the defendant, though often requested so to do, hath not paid the said sum of £75 demanded, or any part thereof. This averment is general, and alleges that no part of the sum demanded has been paid—it is a denial that the amount has been paid at the

Bank of Montreal at Belleville, or any where else, and I think quite sufficient.

SULLIVAN, J., concurred.

Judgment on all the grounds of special demurrer must be for the plaintiffs.

JOY V. MCKINN AND GUESS.

That the defendants proceeding to straighten a highway, acting as trustees of the said highway, under a by-law of the municipal council, passed in 1848, and under proceedings in General Quarter Sessions in 1823, and in so doing encroaching on the plaintiff's possession, are not entitled to the protection of the statute 50 Geo. III., chap. 1. Nor can they give the special matter in evidence under the general issue.

Case for injury to the plaintiff's reversion, being a close of plaintiff's in the township of Kingston, in the possession of John Black as tenant thereof, to the plaintiffs; by cutting, digging, ploughing up, and subverting the earth and soil, and cutting down apple trees and other fruit trees, and prostrating and destroying fences, &c., and making a public or common road in, upon, over and through the said close, &c.

Plea 1st. (separately) Not guilty by statute.

Plea 2nd. (separately) That the said close was not in the possession of the said Black as tenant to the plaintiff, nor did the reversion thereof belong to the said plaintiff at the said time when, &c., and as in the declaration alleged, &c.

This action was tried before Mr. Justice *Draper* at the Spring Assizes, 1850, for the united counties of Frontenac, Lennox, and Addington. It appeared in evidence that the plaintiff was owner of an acre of land, on which was a house and garden and fruit trees, being part of lot number 16, in the third concession of the township of Kingston, of which Black was at the time when, &c., tenant for a year, at the rent of £4 10s. That in the original survey, an allowance for road was left between lots numbers 16 and 17, but not between lots numbers 15 and 16; that being more convenient, the proprietors of numbers 15 and 16, about forty years ago, consented to a public road of forty feet in width, being opened between lots numbers 15 and 16; twenty feet being taken off each lot for that purpose. The course of

this dedicated right of way seems not to have been in a right line. It was said by a deputy-surveyor, a witness for defendants, that although the original intention was that each lot should furnish half the road, yet it was departed from under the impression that as the government allowance joined number 16 on the east, (15 being on the west of number 16) the whole of the new road should be taken off number 16 on the west, in the belief that the proprietor thereof would obtain the right to such government allowance on the east. However this might have been, a road was opened partly on each lot—statute labour had been done upon it—it had been used as a public road for forty years—and the plaintiff's fence, or the fence on the tract owned by him, had during all that time been placed on the edge of the old road. This road, in the line, and of the width, originally opened and adopted, seems to have been so used until the year 1823. On the 20th June, 1822, an application in writing was addressed to the surveyor of highways for the county of Frontenac, signed by nineteen freeholders of the said county, including the plaintiff, and setting forth that they considered it necessary for the convenience of Her Majesty's subjects, that the road between lots 15 and 16, in the third concession of Kingston, should be straightened, and that they wished him to examine the premises, and to report the same to the Quarter Sessions of the Peace, to be holden at Kingston, within and for the said county.

By a report of the said surveyor of highways, dated Kingston, 6th of April, 1823, to the Justices of the Court of General Quarter Sessions, to be holden at Kingston in and for the Midland District on Tuesday, the 3rd of April, 1823, reciting the foregoing application, he reported that having examined the premises, he conceived that the allowance for road being as well adapted for the purposes of a highway as that which was then occupied, it would be proper to straighten the said road, although not so much on account of shortening the road, or benefitting the public travel, as that of interfering with private property and misplacing the statute labour. At the foot of this report is subscribed,

"Allowed.

THOMAS MARKLAND, *Chairman.*"

Endorsed thereon was a certificate of the surveyor of highways, dated April 6th, 1823, that pursuant to the statute, he had caused copies of the report to be affixed at two public places, mentioned, &c.

Also, "April, 1823: Road report relative to a road between 15 and 16, in 3rd concession, Kingston. Confirmed. Entered." The latter in the handwriting of the then Clerk of the Peace. Also, "Order given to Jethro Jackson, December 3rd, 1823. J. NICHOLLS, Jr., D.C.P."

Mr. Nicholls, who is now Clerk of the Peace, said he must have issued the order; but no order was produced or accounted for, or the contents shewn, or whether addressed to Jackson, or framed in general terms to straighten the road.

Nothing seems to have been done upon the foregoing application, report, confirmation and order; but by a by-law of the Midland District Municipal Council, passed the 12th June, 1848, for raising a sum of £15,000 for making, improving and maintaining certain roads in the said district (No. 76), it was enacted that the said loan, or such part thereof as should be raised, should be appropriated for the making, improving and maintaining certain specified roads; among others (No. 4) a road extending about nine miles from Waterloo, to intersect the lines between lots Nos. 10 and 11, 7th concession of Kingston, &c., on the old line of road, passing Counter's and Merrill's taverns; which road, it was admitted, included the road in question between 15 and 16 in the third concession aforesaid. It was also admitted that the defendants were, by a by-law of the same council, appointed trustees for the aforesaid road.

A surveyor was employed to run the line between 15 and 16 in 1821; in 1824 to survey the south half of 16—when he laid out 40 feet for a road on No. 16; and in 1827 to lay off the acre owned by the plaintiff; but the travelled road was then 40 feet west of the line he marked as the boundary of the acre, and the land was actually inclosed up to such road. In this state it seems to have remained until the defendants, acting under the foregoing by-laws in laying out moneys on this road, and on the proceedings in

general quarter sessions in 1823, as authorising them so to do, proceeded in May or June 1849 to straighten the line of the road, and in so doing encroached upon the possession of the plaintiff's tenant (holding under a lease for a year from March, 1849,) along the whole front of his lot, the extent of which was said by some to be nine, and by others to be forty feet; they also pulled up the fence enclosing the lot—pulled up some apple trees—subverted the soil, and converted that part of the plaintiff's close into a public road which constituted the injury to his reversion for which the action was brought.

It was, on the facts in evidence, contended that the defendants were entitled to give the special matter in evidence under the general issue, and to the protection of the statute 50 Geo. III., ch. 1, under which they acted *bona fide*—and also, that the action was too late, not having been brought within three calendar months after the act done—and that they were justified in what they did by the proceedings and order of the quarter sessions in 1823. The learned judge rejected such defence, and left it to the jury, saying the by-law would as well or better apply to the old travelled road, rather than to the line of road which the order of the quarter sessions contemplated or professed to confirm.

The jury found for the plaintiff, with £20 damages.

In the following term a rule was obtained, calling on the plaintiff to shew cause why such verdict should not be set aside and entered for the defendants, pursuant to leave reserved at the trial—or a new trial be had between the parties, the verdict being contrary to law and evidence: for misdirection, excessive damages, surprise, and on affidavits filed. The affidavits relate principally to the value of the property, and the injury committed to the plaintiff's reversion, in order to show that £20 far exceeds the actual amount of damages sustained.

Cause was shown for the plaintiffs during the same term.

The defendants' counsel relied principally on the ground, that in the leave reserved to move—it being left to the court to draw all proper conclusions from the evidence, as a jury might do—it appeared that the defendants were

public officers acting *bona fide* as such in the supposed execution of a legal authority, under the order of the sessions, to widen or straighten the road, and entitled to the protection of the statute; and if so, the action was too late; that the proceedings in the quarter sessions and by-law justified them; referring to statute 50 Geo. III., ch. 1, sec. 34, and statute 4 & 5 Vic., ch. 10, secs. 45 & 51, which last confirmed the order of the quarter sessions; and citing 1 B. & Ad. 391; 10 B. & C. 277; 3 B. & Ad. 330; 5 East. 115; 3 M. & S. 580; 9 B. & C. 806; 2 U. C. R. 206; 3 Y. & J. 60: that *Rex v. Sanderson*, in U. C. Q. B. R. was an indictment, and although it may show the order of the sessions was imperfect, in not defining the width and the exact line of the proposed straight road; it did not apply against the defendants' right to the protection of the act, as having acted *bona fide* under it. He also contended that the damages were excessive.

For the plaintiffs it was contended, that the defence relied upon should have been specially pleaded; that the defendants had no authority to deviate from the old line of road; that the proceedings in the sessions were void for uncertainty, and insufficient—and if not, that they were absolutely null and void from lapse of years, not having been acted upon within twenty years; that the object was to avoid interfering with private property, the very thing of which the plaintiff complained; that the case of *Rex v. Sanderson* shows the order of sessions void; that the defendants acted without any authority, and were entitled to no protection; that there was no misdirection, and that the damages were not excessive.

MACAULAY, C. J.—The statute 33 Geo. III., c. 2, sec. 5, authorised the township meeting to choose and nominate overseers of highways, to oversee and perform such things as should be directed by any act to be passed touching or concerning the highways and roads in the province.

The statute 50 Geo. III., ch. 1, authorised the justices of the peace in quarter sessions to appoint surveyors of highways, and prescribed their duties. Section 3 enacted, that upon application in writing to such surveyor by twelve free-

holders of any county, stating that any highway or road in their neighbourhood "now in use" was inconvenient, and might be altered, &c. ; or that it was necessary to open a new road or highway, he should examine the same, and report thereon in writing to the justices at their next ensuing quarter sessions, describing particularly the alteration intended to be made, or new highway or road to be opened, giving at the same time public notice, as therein provided ; and if no opposition should be made to such report, the justices were required to confirm the same, and to direct such alteration to be made, or such new highway or road to be opened accordingly.

The rule by which it is to be determined whether a defendant is entitled to the protection of the act 50 Geo. III., ch. 1, will be found in the following cases : 10 B. & C. 277 ; 3 M. & S. 580 ; 1 B. & A. 227 ; 6 B. & C. 351 ; 1 B. & A. 227 ; 3 B. & A. 330 ; 2 B. & B. 619 ; 6 B. & C. 351 ; 9 B. & C. 809 ; 4 B. N. S. 41 ; 9 A. & E. 654 ; 4 A. & E. 774 ; 6 A. & E. 661 ; 9 M. & W. 736 ; 15 M. & W. 346 ; 10 A. & E. 582 ; 3 Q. B. 997 ; 15 M. & W. 357 ; 16 M. & W. 77 ; 10 Q. B. 144.

The defendants claimed to have acted under the act 50 Geo. III., ch. 1. There is no reason to doubt that the defendants acted *bona fide*, at least thus far, that being appointed trustees to expend money on this road, they conceived themselves empowered by law to make it straight, and in doing what they did, acted *bona fide* in their character of trustees. The act authorised and required overseers of highways to obey certain orders of the justices acting as commissioners of roads, and clothed them with certain protection. From the passing of the 33 Geo. III., c. 2, until the passing of the 12 Vic., c. 81, the appointment of such overseers rested with the annual township meetings ; that is, until and at the time the by-law was passed, and when the defendants acted under it. The presumption therefore must be, that, irrespective of the by-law, there were regularly appointed overseers, within the division of one of whom the road in question came, but the expenditure of the money under the by-law was not entrusted to the said overseers. The de-

fendants were specially appointed for that special purpose—no general or implied duty, as overseers of highways, vested in them: they therefore did not fill the character contemplated in the statute; but if they had, the statute on the subject of overseers had been changed between the justices' order in 1823 and the passing of the by-law in 1848. The statute 33 George III., c. 2, and 50 Geo. III., c. 1, sec. 11, 14 and 33, were repealed by 5 Wm. IV., ch. 8, in 1835, and 1 Vic., ch. 21, in 1838; and if Jackson, to whom such order was delivered in 1823, was overseer at the time, and as such was directed to make the necessary alterations in the road, it can only be regarded as a special order to him personally. The act directing the trustees to order the road to be opened, and their having so ordered, would not constitute it a continuing order to all future overseers—certainly not after the authority contained in 50 Geo. III., ch. 1, to warrant the justices ordering the overseers what work to do, had ceased. From the year 1835, the overseers acted under 5 Wm. IV., ch. 8, and 1 Vic., ch. 21—not 50 Geo. III., c. 1. For any thing done by overseers after 5 Wm. IV., ch. 8, was passed, no protection could have been derived under 50 Geo. III., ch. 1, sec. 33, which as to overseers was repealed: the defendants of course could not be protected by a law that had so long ceased. The act 4 & 5 Vic., ch. 10, transferred to the municipal councils the powers previously possessed by the justices, and they might thereupon issue orders to overseers of highways—but under the act 1 Vic., c. 21, not under the act 50 Geo. III., c. 1. The defendants consequently could only be acting under the last mentioned act, under the impression that as *quasi* overseers, the proceedings and order of the sessions in 1823 continued in force, and entitled and required them to execute such order.

The proceedings on the files of the court of course subsisted, and were transferred to the possession of the council, and were open to be inspected by them. They knew then that in 1823 the road had been ordered to be made straight; but although the act 50 Geo. III., ch. 1, directed an order to issue for its opening, and may have justified any one in

doing it, the order itself could only be imperative upon an overseer or the overseers to whom directed and delivered, subsequent overseers would not be indictable for disobedience of it, which is a test ; and the defendants, having no reasonable ground to suppose they were the overseers, or that it was directed to, or imperative upon them, could only have supposed they had a general authority in law to make the road straight, in expending public moneys thereon. They could not have reasonably supposed it was incumbent upon them, or their duty, (however within their legal authority, as entitled to abate a nuisance or remove obstructions from a highway,) to widen or straighten the road, merely by reason of their appointment under the by-law, which spoke only of the old line of road. They would not be entitled to the protection of sec. 33, if still in force, not being overseers or acting under their directions ; and if not, or if they had no reasonable ground to suppose they were, how could they be acting in pursuance of the act, so as to come within sec. 34 ? This section was intended to apply to all others, as well as overseers acting under it, and after the repeal of those clauses relating to overseers, overseers appointed under subsequent acts could not claim protection, as acting under that act. It appears to me that the defendants are not entitled to the benefit of the 34th section, because they were not overseers, and were not in any capacity acting in pursuance of the act,—they were acting in a different capacity, and under and in pursuance of other acts and by-laws. The justices who issued the order in 1823 would not be liable to answer for what they did, as being done under their orders, which is another test ; and sec. 33, if in force, would not have discharged the defendants from this action. If the justices would be liable for the defendants' acts, of course they would be entitled to the protection of the 34th section of the act. The case is reduced therefore to the consideration, whether the proceedings in 1823, which were under and in pursuance of the act, have in themselves, or from any aid derived from 4 & 5 Vic., ch. 10, the effect of making the straight line adopted thenceforth a part of the highway ; and, in short, the effect

of substituting a straight for the previously winding line of road, so that any person working on the highway at any future time might legally alter the old road and adapt it to the new line, and it is under this impression the defendants seem to have acted. It has not, however, been contended that the proceedings are valid or not void for uncertainty, according to the case of *Rex v. Sanderson*; and if they were valid, so as to justify the defendants in opening the new or straight line of road, after the lapse of so many years, as being vested in the Crown in 1823, under sec. 35, and so public property, still such justification is not pleaded or admissible in evidence under the general issue. Admitting that in 1823 the old road was regularly altered and the new line made a public right of way under the act of 50 Geo. III., ch. 1, and that any subsequent overseers or pathmasters could justify by the opening of it accordingly, still their doing so would not be a proceeding done in pursuance of the act, but under the authority of the common law, which authorised the removal of obstructions to a public highway, as being an abatement of a public nuisance. To be acting in pursuance of the act, the party must do some act which it required him to do, or which he was ordered to do under it; or, at least, he must have had reasonable grounds to suppose he was so required or ordered; without this he could not claim the benefit of its protective clauses, and I think no such ground existed in the present instance. I do not doubt the defendants thought the new line was constituted a public right of way in 1823, and so continued in 1848, and that they were in law justified in opening it, and did so open it *bona fide*; but I do not think they had any reasonable ground to suppose, or did suppose, that they were acting in pursuance of the act, or of the justices' order, as binding upon them, and rendering it incumbent on them to make such alteration, in expending the moneys directed to be laid out under the by-law. The justices' order (otherwise than as a material ingredient in rendering the new line of road a part of the highway) had long been obsolete. It had never been acted upon. Jackson, who would have been entitled to the protection of the statute had he acted

bona fide, although illegally, did nothing under the order. That part of the plaintiff's land which was in 1823 intended to be embraced in making the road straight, had never been disturbed. The owners had not been dispossessed. It was never taken into occupation and used as a public road. In fact the whole proceedings laid dormant for five-and-twenty years. Under such circumstances, I think it behoved the defendants to have been more cautious, (10 Q. B. 144,) for there is much room to question whether the proceedings in 1823 (if otherwise valid) could have been acted upon in that summary way at so late a period; whether, in short, they had not been abandoned, or virtually ceased to be valid, and the road, as used for the last twenty years previous to 1848, been established as the highway between the lots numbers fifteen and sixteen. And the statute 9 Vic., ch. 8, prohibiting the opening of government allowances, under circumstances resembling the present, afforded a significant caution in relation to the altering or widening private dedications like the one in question, although the title and recital of that act mentioned only government allowances, the enacting clauses speak of allowances for roads generally; and however the word "allowance" may in construction be necessarily limited to government allowances, properly so called, still there is room to contend for a more enlarged construction; and certainly the premises in question, if not within the terms, are within the spirit of that enactment. I do not think that the proceedings or order of 1823 received any additional validity or force by the statute 4 and 5 Vic., ch. 10, the provisions of which were evidently intended merely to uphold and continue existing matters as they were, and to transfer certain powers reposing in others to the district councils. The proceedings of the defendants must be regarded irrespective of the statute 4 and 5 Vic., ch. 10, in determining their legal validity and effect. The defendants being liable to the action, I do not think a new trial can be granted on the ground of excessive damages. The defendants, although they acted *bona fide*, nevertheless they did so act incautiously and indiscreetly, and the act was one in itself very

offensive to the plaintiff, and from which (in the words of the statute 9 Vic., ch. 8) great inconvenience might arise.

I think the defendants are not entitled to the protection of the statute 50 Geo. III., ch. 1, sec. 34, even if available as still in force, in relation to the suit and the proceedings under it; that no legal defence or justification, admissible under general issue, is made out, and that the rule should be discharged.

McLEAN, J.—In this action the plaintiff recovered a verdict for £20 damages. The defendants pleaded the general issue *by statute*, and contended at the trial that they were entitled to the protection of the statute 50th Geo. III., ch. 1, sec. 34, which declares that for *any thing done in pursuance of that act*, any action or suit shall be commenced and prosecuted within three calendar months of the fact committed, and not afterwards, and that the defendant or defendants, in any such suit, shall and may plead the general issue, and give that act and the special matter in evidence at the trial to be had thereupon, and *that the same was done in pursuance and by the authority of that act*; and if the same shall appear to have been so done, or if any such action or suit shall be brought after the time limited for bringing the same, then the jury shall find for the defendant or defendants, &c. It was urged that the District Council were placed in the position formerly occupied by the justices of the peace, in reference to public highways, and that any person employed under the authority of a District Council, as the defendants were, must be entitled to the protection of the statute to the same extent as if they had been acting under the authority of the justices of the peace. It appeared that a dedication had been made by two adjoining proprietors of land, in the township of Kingston, of twenty feet of ground from each of their lots, 15 and 16, third concession, for the purpose of a public highway, and that the road actually opened and travelled, for many years, did not follow a straight line, but occasionally diverged from it to either side, and that the justices of the peace had by an order, not very precise or formal in its manner of expression, directed the road to be straightened

in 1823, but nothing appears ever to have been done under that order. Up to the time of the alleged trespass by the defendants, the road continued to be travelled precisely as before such order was made. The District Council of the Midland District granted a sum of money by a by-law to be laid out in making and improving the *old road*, and the defendants acted as commissioners under that by-law, in carrying out its provisions. They pulled down the fence, and encroached to the extent of forty feet, on lands long in possession of plaintiff and others, cutting down some fruit-trees which were growing within the forty feet of ground, over which the defendant made a road, thus leaving the old travelled path, and establishing the whole road on the premises claimed by plaintiff, in order, as it is alleged, to straighten the road as authorised by the order of the justices in general quarter sessions.

By the 45th section of the first Municipal Council Act, 4th and 5th Vic., ch. 10, all rules, orders and regulations of any kind, made before a certain day by the justices of the peace for any district, relative to any rate, assessment, road, public work, matter or thing, by that act placed under the control of the District Council, shall remain in force and effect until it be otherwise ordered by a by-law of the District Council. Under this section, continued in the last act, 12th Vic., ch. 80, the order of the justices of the peace, if otherwise valid, for straightening the road in question, would remain in force, and might be carried into effect under the District Council; but in such a case, if an action were brought like the present against any party employed in straightening and opening the road, it would be necessary to plead the facts specially, unless such party could be considered as acting under the authority of 50 Geo. III., ch. 1, sec. 34. In pleading it would be necessary to justify, on the ground that the party was employed in removing a nuisance from a public highway. In this case the defendants have not pleaded specially, considering that they were protected by the statute, and that there was no necessity for their so doing. They are therefore without any defence, if they are not entitled to such protection.

By the 39th sec. of the Municipal Act, the District Councils were authorised to make by-laws for the making, maintaining or improving of any new or existing road, street, or other convenient communication and means of transit within the limits of the district, or for the stopping up, altering or diverting any road, street or communication within their limits. In passing a by-law granting a sum of money, and appointing commissioners to expend it in making and improving the *old road*, the District Council could scarcely have supposed that commissioners who derived their authority from the by-law, could be acting in pursuance of the act 50 Geo. III., ch. 1, or that they would need or be entitled to its protection. The commissioners were not in fact acting under the provisions of that statute—they had no public duty under it to perform—their proceedings were wholly under the by-law, and their acts were not in pursuance of any authority. If they were justifiable, as no doubt they were if the ground taken by them actually formed a part of the original dedication for a road, they should have pleaded the facts specially, and in that case would no doubt be entitled to a verdict. As the pleadings now stand, the verdict against the defendants is supported by the evidence, and being for a small amount, it would not be worth while to grant a new trial, with a view to amend the plea, as a new trial could only be granted on payment of costs, which would no doubt far exceed the amount of the verdict, and the matter would still be open to further and uncertain litigation. On these grounds, therefore, I think the rule *nisi* granted in this case must be discharged.

SULLIVAN, J.—The principal question raised at the trial and on the argument of this case was, whether the defendants, who were commissioners to expend a sum of money in macadamizing a road under a by-law of the Municipal Council of the late Midland District, and who prostrated and removed the plaintiff's fence, and attached a portion of his close to the road, under pretence of being or supposing that they were authorised to straighten the road by an old order of the quarter sessions, passed in the year 1823, and

not shown to have been acted upon up to the time when the defendants took it upon themselves to straighten the road, were entitled to the protection of the statute 50 Geo. III., ch. 1—that is to say, whether they were entitled to plead the general issue and to give special matter in evidence, and to have the action brought against them within six calendar months after the cause of action arose. Several objections were taken by the plaintiff's counsel to the order of sessions. I think the order was not sufficient on the face of it, and that probably it was not sufficiently founded in the preliminary proceedings required by the statute; but nevertheless, it seems to me that the path-masters or other persons to whom the order might have been issued, if they *bona fide* and in due season acted under it, would not be prevented by the insufficiency of the order from having the protection of the statute, as to the form of pleading, and as to the time of commencement of suits against them;—the cases 1 B. & Ad. 391, and 10 B. & C., 277, and very numerous other authorities particularly mentioned in the *Chief Justice's* judgment, show this very clearly. In the case I have supposed, the persons to whom the order would have been given or addressed would have been acting however illegally under the statute—that is, they would not have acted without the statute, and it would have been in the way of their duty to act; and if, in obeying the order of sessions, they had acted erroneously, they would be entitled to the protection the statute meant to give to an honest but erroneous exercise of its powers.

The provincial statute 12 Vic., ch. 80, entitled, “An act to repeal the acts now in force in Upper Canada, relative to the establishment of local and municipal authorities and other matters of a like nature,” contains, in the schedule of the acts repealed, the statute 50 Geo. III., ch. 1, sections one to eleven, and sections thirteen to thirty-four inclusive, including the section which affords the protection claimed by the defendants. That act was passed 30th May, 1849, and came into force on the 1st of January, 1850, before which day, I take it from the notes of the trial of this case, the injury complained of was committed, but after which

the trial was had. The first section contains the following proviso: "That notwithstanding the repeal of the acts and parts of acts hereby repealed, all acts which might have been done, and all proceedings which might have been taken or prosecuted, relating to any offences or neglects which may have been committed, or to any matters which shall have happened, &c., before the day on which this act shall come into operation, shall and may still be done and prosecuted," &c.

I am inclined to think that if, in relation to the trespass complained of, which happened before the act 12 Vic., ch. 8, came into force, the defendants would have been entitled to plead the general issue and give special matter in evidence, or to have judgment of nonsuit; if the action were not brought within the time prescribed by the repealed statute, the same may still be done, notwithstanding the repeal, and the defendants would still be entitled to the protection of the act as claimed by them, in relation to the trespass committed before the repealing act came into force.

But, in the present case, I am unable to trace any connexion in the way of duty between the defendants and the order of sessions—it was neither addressed to or delivered to them—they were not the proper officers to execute it. To that order, whether legal or invalid, they were strangers; the utmost that they can say is, that they supposed the road to have been legally opened or straightened by the operation of the order of sessions, and that they trespassed in the abatement of a supposed nuisance. The statute 50 Geo. III. contains nothing to protect strangers in thus acting, or in exercising any supposed right which would belong to them equally with all Her Majesty's subjects, if such right existed at all. It was argued, on the part of the defendants, that as the 51st section of the statute 4 & 5 Vic., ch. 10, vested in the municipal Councils the powers which were formerly exercised by the justices of the peace, with regard to highways and bridges, that therefore the powers of the municipal councils were identical with those which had belonged to the justices, and that the 50 Geo. III. not being repealed, the officers of the municipalities were entitled to

the same protection as had belonged to the persons whose duty it had been to carry into effect the orders of the justices; and that therefore these defendants, being the commissioners of the municipal council, and committing the trespass complained of in doing what they supposed to be the performance of their duty, were entitled to the protection which the path-masters would have enjoyed had they in due season carried out the order of the sessions.

But, in the first place, the authority of the council was much larger than that of the justices. The 39th section of 4 & 5 Vic., ch. 10, gives them such full powers, with regard to highways and bridges, that the 51st section of the same act, which purports to transfer to the council the powers of the justices, was altogether unnecessary for the purpose of conferring power, though it may have been necessary for the purpose of taking the power formerly enjoyed by the justices away from them; and there is nothing in the statute 4 & 5 Vic., ch. 10, which affords the protection given by the statute 50 Geo. III., ch. 1, to the persons acting under it. For example, the powers enjoyed by the justices for the purposes of improvements on roads was limited in each instance to £50. There was no such limit to the powers of the municipality. If we were to hold that the protection of the former act extended to the persons acting under the municipal act, it could only be in cases where the council was acting within the limits of the powers formerly enjoyed by the justices, so that in cases where by-laws were passed by the council, involving expenditure under £50, the officers would be under the protection of the statute 50 Geo. III.; but in cases like the present, where the by-laws under which the defendants were acting involved the expenditure of many hundred pounds, there would be no such protection, for the council were doing what the justices were never empowered to do.

And, secondly, the defendants in this case had no order to straighten the road—their duty was to lay out money upon the road.

It was contended in the argument that the order of sessions for the straightening the road in question had the

effect *per se* of vesting the soil and freehold of the road in the Crown, as it would have done if actually straightened by virtue of the 35th section of 50 Geo. III., ch. 1.

I am of opinion that the section of 50 Geo. III. alluded to, refers to actual alterations and amendments of old roads, and to the laying out of new roads, not as ordered to be effected, but as actually done on the ground, and there is nothing to show the *locus in quo* to be part of a road actually opened or laid out under the order of sessions.

As regards the excess of damages complained of in this case, I am not disposed to disturb the verdict. If the value of the land taken be excluded from the amount of the verdict, because of the title still remaining with the plaintiff, the damages may perhaps be considered as assessed too high; but the whole sum given is small, and moreover, if the municipality should consider it right to pass a by-law, confirming the road as now opened, the fact of the plaintiff, by means of the verdict, having recovered full compensation for the value of his land, will be considered, in the event of any application of his to be further reimbursed. I agree with the rest of the court in thinking that the rule in this case should be discharged.

THE MARMORA FOUNDRY COMPANY V. MURNEY.

Action for calls under the statute 1 Wm. IV., chap. 12, against the defendant as one of the stockholders: *Held per Cur.*—that stockholders in the said corporation are admissible as witnesses for the plaintiffs, under the statute 12 Vic., chap. 70; that proof of a conveyance of Hetherington's interest in the Marmora Iron Works was not required under any of the issues; that the said act is not obsolete for non use; that the clauses of the said act requiring the books of subscription to be opened within two months, is only directory; that the subscription books subsequently opened may be considered as in connexion with the subscription books previously opened, and that all the proceedings from the beginning may be taken together in connexion with or relation to the object; that the omission of Hetherington's name in the new subscription books (he being dead) does not render the proceedings of the company invalid, nor is it fatal to the plaintiffs in this action; that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the act of incorporation, is sufficient; that the names of the petitioners in the said act named need not necessarily be signed to the new subscription books; that the defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock-book of the company.

This is an action of debt for the first ten per cent., and two subsequent calls of ten per cent. each, on twenty-five

shares of £12 10s. each of the capital stock of the said company, subscribed for by the defendant. The declaration contains three counts—one for each instalment (for which see the case on demurrer.)

The defendant pleaded to the first count :

1. Never indebted, *modo et forma* ; concluding to the country.

2. That the plaintiffs induced the defendant to contract the said debt by fraud, covin and misrepresentation ; concluding with a verification.

3. That defendant did not subscribe for nor become the owner or holder of the said number of shares of the said stock, or of any number or quantity ; concluding to the country.

4. That no meeting of the subscribers to or for the stock of the plaintiffs was at any time before the commencement of this suit duly had, convened, or called together for the election of directors, *modo et forma* ; concluding to the country.

5. That no notice of such meeting, as in the said first count mentioned, was duly given or published in the *Upper Canada Gazette*, or the said other papers therein mentioned, *modo et forma* ; concluding to the country.

6. That no election of directors for the direction of the affairs of the company, as therein mentioned, was duly made before the commencement of this suit, *modo et forma* ; concluding to the country.

7. That no books of subscription were opened within two months after the passing of the act (1 W. IV., c. 12,) as thereby required ; concluding with a verification.

8. That no books of subscription were opened under the authority or direction of a majority of the petitioners in the said act named, before the commencement of this suit ; concluding with a verification.

9. That no books of subscription were ever opened according to the provisions of the said act ; concluding with a verification.

10. That no person or persons were ever directed or appointed before the commencement of this suit by a majority

of the petitioners in the said act named to open books of subscription for stock of the said company ; concluding with a verification.

11. That before the commencement of this suit, by reason of the non-payment of the said instalment in the said first count mentioned, and the neglect and refusal to pay the same by the defendant, the said shares therein mentioned became and were, by the said act, forfeited, and plaintiffs assented thereto, and acquiesced in the said forfeiture ; concluding with a verification.

Demurrer to second and third counts, and joinder in demurrer.

Replication to 1st, 3rd, 4th, 5th and 6th plea ; *similiter* to 2nd, *de injuria*.

To 7th : That books of subscription were opened within two months after the passing of the said act ; concluding to the country, and issue joined.

To 8th : That books of subscription were opened under the authority and directions of a majority of the petitioners in the said act mentioned, before the commencement of this suit ; concluding to the country, and issue joined.

To 9th : That books of subscription were opened according to the provisions of the said act ; concluding to the country, and issue joined.

To 10th : That a person was directed and appointed before the commencement of this suit, by a majority of the petitioners in the said act named, to open books of subscription for stock of the said company ; concluding to the country, and issue joined.

To 11th : That the said shares in the said first count mentioned were not, nor was any of them forfeited, *modo et forma* ; concluding to the country, and issue joined.

Venire to try the issue and assess contingent damages, &c. This case was tried before Mr. Justice *Draper* at the last assizes, held at Belleville, for the county of Hastings, when the jury found a verdict for the plaintiffs on all the issues, with damages (in debt) on the first count, to £27 3s. 6d., and assessed contingent damages on the second count at £26 10s., and on the third count at £26 5s.

Last term a rule was granted, on the motion of the defendant's counsel, calling on the plaintiffs to show cause why the verdict should not be set aside, and a nonsuit entered on leave reserved, as being contrary to law and evidence, and the judge's charge; against which cause was shown during the same term.

It appeared in evidence, that the formation of the plaintiffs' company was authorised by the statute of U. Canada 1 Wm. IV., c. 12, passed the 16th March, 1831, which recited, among other things, that Thomas Hetherington, Peter McGill, and Anthony Manahan, had by petition represented that the said Hetherington was then the proprietor of the establishment and manufactory, situate in the township of Marmora, in the Midland District, called "The Marmora Iron Works," and that he was willing and desirous to depart with his sole property therein to a company to be formed and incorporated for the purpose of carrying on the said manufactory, and that said petitioners had prayed that they, together with such others as should become stockholders in the company, might be incorporated for the said purpose, and enacts that the said Hetherington, McGill and Manahan, and all such persons as should thereafter become stockholders in the said company, should be, and were thereby constituted and declared to be a body corporate and politic, by the name of the "Marmora Foundry Company," with continued succession; and by such name should be capable of contracting, and being contracted with, of suing and being sued^(a) in all courts and places, in all manner of actions, &c., and might have a common seal, and might and should be capable of purchasing, having and holding to them and their successors, any estate, real, personal or mixed, to and for the use of the said company, &c., &c.

Sec. 2 limits the whole amount of stock, estate and property which the company should hold, to £50,000; that the shares should be £12 10s. each, and not exceed 4000 in number.

Sec. 3 enacts that books of subscription should be

(a) P. S. 7 W. 4 c. 14; sec. 14, 12 Vic., c. 10, sec. 5, No. 24.

opened within two months of the passing of the act; when, where, and by such person or persons, and under such regulations as the majority of the petitioners should direct and appoint.

Sec. 4 enacts that any person might subscribe for any number of shares, the amount whereof should be due and payable to the company as therein mentioned.

Sec. 5 enacts that any stockholder neglecting or refusing to pay instalments due on any share or shares, shall forfeit such share or shares, with the amount paid thereon, and that they shall be sold in such manner as the directors shall think fit.

Sec. 7 enacts that on £20,000 being subscribed for, it shall be lawful to call a meeting of the shareholders for the purpose of electing directors, and that the directors then elected shall be capable of serving until the 1st Monday in August succeeding; that on £1000 being paid on the shares subscribed, the directors shall commence the business operations of the company: provided that no such meeting shall take place, until notice thereof shall have been published in the *U. C. Gazette*, and some two of the newspapers published in the Midland District, at the distance of not less than thirty days previous to such meeting.

Sec. 8 enacts, that the affairs of the company shall be managed by five directors, one being president; to be elected, &c., as therein (and in sec. 12) prescribed, &c.

Sec. 9 enacts, that in case an election of directors shall not be made on the day prescribed, the company shall not in that case be deemed to be dissolved, but the election may be made on any other day, in a manner regulated by the laws and orders of the company, &c.

Sec. 10 enacts, that the directors may make by-laws, &c.

Sec. 11, and declare dividends, &c.

The act contains no limitation clause.

At the trial of the cause three witnesses were called for the plaintiff, one of whom said he thought he had subscribed for some shares in a book opened at his office in Kingston in the year 1831, but that that being many more than six years ago he did not consider himself a stockholder.

The other two witnesses stated that they had signed a subscription for stock in a book opened at Belleville in 1848. It was objected that none of the witnesses were admissible, but their evidence was received.—Taylor's Evidence, 871, 974, 978; 12 J. 581; 13 J. 494.

The first witness stated, that soon after the passing of the act in 1831 stock books were opened at his office in Kingston, in the Midland District, in which district the Marmora Iron Works were then situated. Notice to produce such books was served on the defendant. This witness said the books had been several years in his office, that he could not then find them, and that he did not know what had become of them; that they had been put away among old papers as perfectly useless: that his office had been moved since, and whether the books had been delivered to any other parties or not he could not say, but he had no recollection of giving them to any one; that they might be in his office still, though he had searched two or three days for them without success; he thought they were lost; that all the subscription-books were prepared at Kingston, and that the following names were placed at the head of every book, viz., Peter McGill, Thomas Hetherington, and Anthony Manahan, by whose authority they were opened; that one was sent to Belleville; a notice that books were opened was published in the *Chronicle and Gazette*, at Kingston, about March or April, 1849; admitted that defendant did not subscribe in these books.

The second witness called stated, that he had subscribed for stock in a book opened at Belleville in 1848, and that the defendant also subscribed therein, proving his signature. This book was headed thus:

“A subscription list of the stockholders of the Marmora Foundry Company, proposed to be established by virtue and under the authority of a statute of the late Provincial Parliament of Upper Canada, passed 16th March, 1831, in the first year of the reign of his late Majesty King William the Fourth, chapter 12, and the undersigned hereby promise to pay the amounts opposite to their respective names to the party hereafter authorised to receive the same, in such

instalments as are authorised by the statute, after the election of directors by the stockholders shall have taken place in accordance with the provisions of the enactments referred to.

<i>"Names.</i>	<i>Residence.</i>	<i>No. of shares.</i>	<i>Amount.</i>
" 116. Edmund Murney,	Belleville,	20,	£250."

That more than £20,000 having been subscribed for, a notice calling a public meeting was duly published in the *Upper Canada Gazette* of 25th November, such meeting to be held on the 27th December following, and in the other papers as required by the act; that the meeting was held on the 27th December; that defendant was present, and that five directors were elected.

The third witness proved the loss or destruction of the original manuscript notices calling the meeting above mentioned, so as to admit secondary evidence thereof; he also proved the loss of a notice signed by Peter McGill and Anthony Manahan, two of the petitioners named in the act, the third (Hetherington) being dead.

The notice being in these words:—

"According to the third section of the twelfth chapter 1 Wm. IV., for the purpose of opening books of subscription for the stock in the Marmora Foundry Company, we, the surviving persons by the said act authorised, hereby direct and appoint that books of subscription be opened at the following places, by the following persons, and on the dates within mentioned:

At Belleville, 17th October, 1848, by ———

At Kingston, 18th " " by ———

At Cobourg, 18th " " by ———

And also at Picton, Port Hope, on the 18th, and at Toronto, Hamilton, Montreal and Peterborough, on the 23rd October, 1848.

"Signed, PETER MCGILL,
 A. MANAHAN."

The witness, (being the secretary of the company,) on cross-examination, produced and proved a minute-book of the directors, which, among other things, contained the following entry, made at a meeting of the directors held at

Belleville, on the 1st of August, 1849 :—" Present—Nelson G. Reynolds, Esq., President ; Peter Robertson, Esq., and Robert Read, Esq. It was ordered, that the names of all subscribers to the capital stock of the company, who have not yet paid any instalment on the same, be erased from the subscription stock-book of the company."—See section five of the act.

At the trial of the cause the defendant called no witnesses, but his counsel objected—

1st. That it appeared the books were originally opened in 1831, for the subscription of stock pursuant to the statute ; that the books opened in 1848 were not opened under the act ; that the words " proposed to be established," were omitted, and the very heading and character of the promise to pay shewed it ; nor was it a carrying on of the old company, and that the original subscribers were the persons to have elected the directors.

2ndly. That the names of the three petitioners named in the act are not subscribed in the books now produced, being the books the parties are acting on.

3rdly. That there is no proof of the election of any directors since 1848, or that there were any when this action was brought, or that there are directors at the present time.

4thly. That there is no proof of notice to the defendant of the first election of directors, and that the first instalment was not payable until he had such notice.

5thly. That there is no proof of the payment of £1000 under sec. 7.

6thly. That if the second and the third witnesses are inadmissible, there is no evidence to charge the defendant, and that they are not admissible.

Leave was reserved to the defendant to move a nonsuit on the foregoing objections.

And the reply was allowed to the plaintiffs' counsel on account of the proof of the minute-book, and entry therein, proved by the secretary (a witness of plaintiffs) on cross-examination. The only matter left to the jury was, whether by reason of the defendant's non-payment of the first instalment, the shares subscribed by him were forfeited, and

such forfeiture assented to and acquiesced in by the plaintiffs; the minute of the directors being left to them as evidence on that issue.

On the other issues the jury were directed generally to find for the plaintiffs, subject to the leave reserved to the defendant to move a nonsuit, and were told there was no evidence to support the plea of fraud.

The jury returned a verdict for the plaintiffs on all the issues, with £27 3s. 6d. damages on the first count, and assessed contingent damages on the second count at £26 10s., and on the third at £26 5s., as already mentioned.

Eccles, for defendant, at the argument, on the return of the rule *nisi*, contended—

1st. That there was no proof of any conveyance from Hetherington to the plaintiffs, without which they had no title to the premises, and the necessity whereof was questioned by the learned judge at *nisi prius*.

2ndly. That the evidence proved the company formed in 1831, (if the witnesses were admissible,) which company may still exist, and the plaintiffs could not, nineteen years afterwards open new books and begin *de novo*, and that mere non user as determined in the case of the plaintiffs v. Ponton, would not put an end to such company; that there, however, it was a naked point in the face of the pleading, while here the facts are specially shewn, and proved a double proceeding in 1831 and in 1848; that if the first attempt proved abortive it could not be renewed, especially at this late period (4 M. & W. 483, Follett *arguendo*); that lapse of time shewed an abandonment of the scheme, and that it could not be revived; that Hetherington was a party to the first books, but not to the last, and being dead he is no party to the present company, and his estate must have descended to the heir-at-law, who is not shown to be a party, if that would do; that none of the petitioners are parties or subscribers to the present stock, and that the company, being formed independently of them, has not a valid legal existence under the act; also, that Hetherington's death presents an insu-

perable obstacle, even if the other two had become shareholders and parties, no right of survivorship being reserved.

3rdly. That there was no proof of any directors existing since 1848, and, therefore, no one entitled to sue (sec. 9 of the act).

4thly. That notice of the first election of directors should have been given, and in its absence the defendant is not liable (sec. 7 of the act.)

5thly. That there was no proof of payment of the £1,000.

6thly. That the three witnesses called at the trial were inadmissible, especially the two last, being interested, and the action brought in their immediate or individual behalf, within the meaning of the proviso in the statute 12 Vic., c. 20, sec. 1 (a); that, however inhabitants or corporators, under municipal or public (non-trading) companies may be admissible, the members of trading companies are not so, owing to their obvious personal and pecuniary interest; that they are *cestui que* trusts, and the parties beneficially interested and like co-partners in trade under ordinary partnerships—the members being the only parties who have an interest.—2 M. & W. 206.

7thly. That the defendant is not estopped by his signature and undertaking in the plaintiffs' book; and if he was, the declaration of forfeiture entered in their books, in August, 1849, puts an end to his liability.

Hagarty, for the plaintiffs, contended :

1st. That books were opened in 1831—and if necessary to support the books and subscriptions thereto in 1848, they may be regarded as the inception of the formation of the company, and as virtually continuing open until 1848; that there was no proof of their having been closed, or the project abandoned, beyond mere lapse of time and quiescence, whence nothing can be inferred; that no persons possessed authority to put an end to the act even by express declaration, much less tacitly by mere delay; that the proceedings were inchoate, and only delayed or suspended.

2ndly. That the witnesses were admissible under the

late act, this action having been commenced after the passing of the said act ; that their being members of the corporation is not a sufficient objection (12 Jurist, 1054.) The test of *Parke, B.*, not applicable, their admissions not being evidence against the plaintiffs, nor the suit brought in their immediate or individual behalf—12 Ju. 581 ; 3 C. B. 299 ; U. C. Reports Q. B., Toronto Gas Co. v. Watson.

3rdly. That the mere resolution to cancel was not a forfeiture completed, only a step towards it. The plaintiffs in this suit v. Ponton—6 M. & S. 707 ; 1 Q. B. 256 ; 15 M. & W. 804 ; 11 su. 31 : that most acts of this kind require a special meeting to declare forfeitures—although this act does not contain any such provision ; that no proof of the present existence of directors was necessary, there being no such issue raised, and that therefore the existence of directors is to be presumed. Neither was the payment of £1,000 put in issue, or material to be proved ; so far as important, it must in these pleadings be presumed that the plaintiffs' company went regularly into operation—7 M. & G. 899.

MACAULAY, C. J.—The first consideration is the admissibility of the witnesses, which no longer depends upon the mere question, whether they have technically any pecuniary interest in the event of the suit—but upon the effect of the statute 12 Vic., c. 70, founded on the imperial statute 6 & 7 Vic., c. 85, which enacts, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest, excepting, however, (among others,) any party to any action, suit or proceeding individually named in the record, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, &c. The defendants are not individually named in the record, and, consequently, it depends upon whether the action is brought wholly or in part in their immediate or individual behalf. It appears to me the witnesses were admissible, on the ground that the action is not brought in their immediate or individual behalf, wholly or in part ; no test, that I have found suggested, would apply to show them incompetent ; they did not direct the bringing of the suit, are not liable for costs, nor

are they entitled to the proceeds; their declarations would not be admissible in evidence against the plaintiffs, and their interest is indirect and contingent; if the action was brought for the recovery of an ordinary debt due to the plaintiffs, they would have no direct right to a share of the sum recovered—it would form corporate funds, and their interest therein would depend upon the extent to which it might affect the periodical dividends, or the ultimate division of the assets, upon winding up the affairs of the company; the immediate disposal of the funds would rest with the body corporate, through its directors; and individual stockholders are only interested therein collaterally, as they may enhance dividends or the ultimate surplus.

But the present action is not for a debt contracted in the ordinary course of the plaintiffs' business, but to enforce payment of calls upon stock subscribed for by the defendant. If recovered, the witnesses will have no right to participate in the distribution thereof, it will form part of the capital funds, and their only interest will be contingent upon whatever effect the sum recovered may have upon the profits and gain of the company, and, consequently, upon their shares in the dividends. The money is not to go to them; and if the affairs of the corporation were wound up, it would be returned to the defendant. If the plaintiffs' affairs prosper, they will derive no benefit except contingently in the shape of dividends, without any right to the capital sum contributed by the defendant. If the business is unsuccessful, the result of this suit will not increase or diminish their liability to sustain loss, which is limited to the amount of their own stock, respectively; and I do not think the contingent and indirect interest which they have can be considered as showing the suit to be brought in their immediate or individual behalf, wholly or in part.—*Sage v. Robinson*, 12 Ju. 1054; *S. C.* 3 Ex. 142; *Colombine v. Penhall*, 14 Ju. 460; *Clarke v. Bell*, 12 Ju. 421; *Needam v. Law*, 12 M. & W. 560; *Uidal v. Walton*, 14 M. & W. 254; *Hart v. Stephens*, 6 Q. B. 937; *Hill v. Kiching*, 3 C. B. 299; *Belcher v. Brake*, 2 C. & K. 658; 2 Taylor Ev. 893, sec. 978; *Prov. Stat.* 12 Vic., ch. 84, sec.

31; 19 Law J., V. C. R. B. 278. Being of this opinion, it becomes necessary to notice the other points of objection, which can only properly be entertained in reference to the issues to be tried.

1. This remark applies to the first point made at the argument, namely, that no conveyance from Hetherington to the plaintiffs was proved; such proof was not required under any of the issues, nor was such a conveyance a condition precedent to the plaintiffs' right to make or sue for calls. It might be necessary to raise funds, in the first instance, to enable the plaintiffs to treat with him for the renting or purchasing of the Marmora works.

2. With respect to the second point; *Lee v. Milner*, 2 M. & W. 824; *Thickness v. Lancaster Canal Company*, 4 M. & W. 472—show that the statute 1 Wm. IV., c. 12, is not obsolete or at an end for non-user; that mere delay did not put an end to the company for non-user, was decided in the case of the present plaintiffs against Ponton, in this court; and notwithstanding the abortive attempts to establish the company soon after the passing of the act, proceedings might be resumed. So far as the opening of books within two months was indispensable under the third section of the act—books were in fact opened within that time; I am not satisfied, however, that this clause was more than directory, or that the time is so material as to render the opening of books within the period prescribed a condition precedent; I am disposed to think not.—3 Bur. 1866; 4 Q. B. 431; 7 Q. B. 339.

If, however, essential, I think the whole proceedings must be taken together, and the original books be regarded as the incipient step to meet the exigencies of time, followed by the late proceedings in furtherance of the same object—there is no proof, except delay, of any abandonment of the scheme—the act and the early steps under it having remained dormant for many years, but the cases cited do not seem to warrant us in saying that such a delay can be regarded as a total abandonment, or that the act is null, unlimited as it is respecting the period within which the company was to be formed and go into operation.

Although there is no direct connexion between the old and the new books, by reference or otherwise—still, under this objection, I think all the proceedings from the beginning may be taken together in connexion or relation to the object.

As to the use of Hetherington's name in the new books, I do not think its omission fatal to all that has been done. The recital to the act of incorporation shows that he (being owner of the works) was an original projector and applicant for the corporation, not only assenting to, but soliciting its creation, and it appears that he was accordingly a party to the original stock-books; and he being since dead, the remaining two of the applicants to parliament sanctioned the opening of the last books. Even if such books were actually opened before the sanction and direction of the surviving petitioners was obtained, their subsequent adoption of such act gave validity thereto from that time forward, on the doctrine of principal and agent, and the rule of adoption *ex post facto*—*vide* cases noted in 2 M. & G. 679, 689, 690; 7 M. & W. 243; 14 Ju. 132; 2 Ea. 118.

It does not appear that Hetherington, McGill, or Manahan subscribed for any stock in the first books, or in those more recently opened; although it was no doubt contemplated they would, or that they were by the act required to take stock.

The statute upon their petition constituted them, and all such persons as should thereafter become stockholders, a body corporate, with continued succession, with power of contracting, &c., and of suing and being sued; and in sec. 3 enacted that books should be opened within two months—when, where, and by such person or persons, and under such regulations as the majority of the petitioners should direct and appoint; a proceeding no doubt adopted in order to facilitate the organization of the company, by entrusting the preliminary steps, before there were any stockholders or directors, to the petitioners, and which they might take without becoming subscribers for stock after the books were opened. Although not organized until 1848, the company was created when the act passed, and con-

tinued to exist from that period, notwithstanding its not going into operation for want of members until recently. The evidence shows that books were opened within two months, under and according to the provisions contained in sec. 3, which in strictness proves the issue. The defendant does not plead that the books in which he subscribed were not opened within that time—but that no books were opened. There is much force too in the argument that the defendant is estopped by his own act, in subscribing in the stock-books, acting as a committee-man, and attending and participating in the first election of directors, from objecting to the non-observance of any such preliminary steps.—2 Q. B. 281; 4 Q. B. 431; 7 M. & W. 574.

The want of proof of the continued periodical elections of directors, and of their being directors when this action was brought, is not a matter in issue; the plea is, that no election of directors was duly made before the suit, as in the act mentioned, amounting to a denial that any directors were ever elected, and referring to the necessity for such an election before the first ten per cent. of the stock subscribed became payable; such an election is proved to have taken place (*a*), and the objection, if meant to relate to the time the action was brought, is answered by the decision of the Court of Queen's Bench for Upper Canada—*The Railway Company v. Crookshank*, 4 U. C. R. 309, and the same plaintiffs *v. Gwynne*.

I do not think notice of the election of the first directors a necessary step, nor are the facts of notice, or the payment of £1000 put in issue by the pleadings, otherwise than by the plea of *nil debet*.—6 M. & W. 707.

It appears in evidence, however, that the defendant was present at the election of directors, and, of course, had notice thereof, and proof of payment of the £1000 was unnecessary; the clause is only mandatory or directory to the directors to commence business operations as soon as that sum was paid, and if no subscriber for stock could be sued or compelled to pay calls until that amount was

(*a*) P. S. 7 Wm. IV., ch. 14, sec. 15; 1 Wm. IV., ch. 11, sec. 9; 12 Vic., ch. 10, sec. 5, No. 24.

voluntarily paid, the commencement of business might be effectually prevented; funds must first be realized, and it may be that £1000 has not yet been paid up, or business operations commenced.

As to the alleged forfeiture, I do not think the entry in the plaintiffs' minute book, regarded either as an election or assent, had the effect of discharging the defendant from his liability, or that he thereupon ceased to be a shareholder; the point was, to a certain extent, involved and disposed of in the suit of the present plaintiffs v. Ponton, in this court.—1 Q. B. 256; 6 M. & W. 707; 2 M. & G. 674 & 689; 15 M. & W. 718; 1 Ex. 739; 3 Ex. R. 18; 18 L. J. Ex. 53; 13 Ju. 1008; 5 B. N. S. 270 and 135.

The prov. stat. 1 Wm. IV., ch. 12, contains no express clause respecting suits for calls, but it was decided in the case against Ponton, that the plaintiffs may sue therefor under the general provisions contained in the first section of the act—the prov. stat. 7 Wm. IV., c. 14, sec. 14, and 12 Vic., ch. 10, sec. 5, No. 24, and the words of sec. 4—that the amount of shares subscribed for should be due and payable to the company, as therein mentioned—that is, that ten per cent. should be payable to the company immediately after the election of directors, and the remainder by instalments of ten per cent. as called for; but sec. 5 enacted that if any stockholder neglected or refused to pay to the said company any instalment due on any share or shares held by him at the time required by law, he should forfeit such share or shares, with the amount paid thereon; and such share or shares should be sold for the best price, in such a manner as the directors should think fit. It was also held in the case against Ponton, that the stockholder could not at his own discretion elect to forfeit his shares and exonerate himself from liability to the payment of calls; that it rested with the plaintiffs to enforce forfeitures in their discretion, and that they might waive them although incurred; the question here is, whether or not they have elected the forfeiture of the defendant's shares, and have thereby exonerated him from liability to pay the first ten per cent. thereon.

The first election of directors took place on the 27th of December, 1848, immediately after which the ten per cent. declared for in this count became payable to the plaintiffs, and being then due and payable, a right of action therefor vested in them. On the 1st of August, 1849, (the defendant not having paid any thing on his stock,) it was—at a meeting of the directors, where the president and two others only were present—ordered, that the names of all subscribers to the capital stock who had not yet paid any instalment on the same, be erased from the subscription stock-books of the company. On reference to the almanac, it will be found that this order must have been the act of the directors elected on the 27th December 1848, because by the act, sec. 7 & 8, the annual elections, after the first, are appointed to take place on the first Monday in August, which, in the year 1849, was the sixth day of that month.

It does not appear whether the other two directors (five being the whole number) were present when such order was made, or whether it was a periodical and regular, or a casual or specially convened meeting of the board. However, it is not shewn that such order was ever communicated to the shareholders alluded to therein, or that their names were erased, or that it was ever acted upon.

The present action is brought since 6th August, 1849, and consequently in the time of the directors elected on that day. Presuming such election to have duly taken place in the absence of any proof to the contrary, and admitting that the directors have only an alternative right to enforce payment of the instalments by action, or to declare the shares forfeited, I do not think the mere resolution or order of a majority of them, that the names of defaulters should be erased from the books, although no doubt with an intention to enforce the forfeiture of the shares, is without some other act sufficient to conclude the plaintiffs. I think it is rather to be looked upon as a step taken *in terrorem*, and an inchoate proceeding, unless acted upon and executed. Had the defendant's name been erased, it would have been another thing; but this was not done, and not being executed, I do not consider the order in question more than an

incipient step towards the actual forfeiture, or conclusive upon either party to disfranchise the defendant, or to estop the plaintiff from afterwards suing for the ten per cent. due and payable on and from the 27th December previous. To render the forfeiture complete under the order the names should have been actually erased, if that would be effectual. The directors did not in so many words say the shares were or should be thenceforth forfeited, but that the names of defaulters should be erased, indicating thereby an intention to enforce the forfeiture by an ulterior step, and yet not take it. It required, I think, something more to be superadded—that is, an actual erasure and notice thereof to the defendant, or at least erasure if a forfeiture could be thereby accomplished. In *Jones v. Carter*, (15 M. & W. 718,) it was held that service by the lessor of a declaration in ejectment upon the lessee for the demised premises, for a forfeiture under a proviso in the lease, that for any breach of covenant it should be utterly void, and the lessor be at liberty to re-enter, operated as a final election by the lessor to determine the term, and that he could not afterwards (although there had not been any judgment in the ejectment) sue for rent due in covenants broken after the service of the declaration; but in that case there was a direct overt act in the service of the declaration, and notice to the tenant, who was treated as a trespasser, and who was admitted to defend on the terms of confessing lease, entry, ouster and possession of the plaintiff; and *Parke, B.*, observed and relied upon such considerations, for the tenant had appeared and entered into the consent rule, the lessor of the plaintiff does more than order an action of ejectment to be brought, he actually instituted it, and served the declaration upon the tenant; this was held to render void what before was only voidable, so that the lease could not afterwards be set up again at the election of the landlord, and treated as subsisting. If the order of the directors was of itself equivalent to the service of the ejectment, in putting an end to the defendant's subscription, the analogy would hold; but I do not think it entitled to be so regarded. If the case was reversed, and had the defendant

(desirous of continuing a stockholder) tendered the ten per cent. the day after such order, and the plaintiffs had refused, and the question been whether he had lost his shares, it is by no means clear to me that he would, although in that event such tender and refusal would have been overt acts between the parties, evincing a desire to avoid and a determination to enforce the forfeiture. To this may be added a question, whether the proper mode of enforcing a forfeiture under the act is not by a sale of the shares, and not a cancellation of the defendant's subscription for stock. Before a sale, he might obtain relief in equity, if desirous of retaining his stock, wherefore his shares should not be cancelled, but held subject to sale and transfer to a new purchaser under the act. An erasure of the names as cancelling the shares might entitle the stockholders who had paid such instalments to recover back the money as upon a contract mutually put an end to; or if not, the cancellation of the shares instead of their sale, as forfeited to the company, might be productive of consequences prejudicial to either party, not contemplated by the act, which could not arise if the mode of proceeding to enforce forfeiture by sale be adhered to.

Adverting to the several issues joined, it appears to me,
1st. That there is no evidence to support the plea of fraud.

2nd. That defendant did subscribe for and become the owner and holder of shares as alleged in the first count.

3rd. That a meeting of the subscribers was before suit duly had, convened, and called together, for the election of directors.

4th. That notice of such meeting was duly given, as in the first count alleged.

5th. That an election of directors, as there also alleged, was made before suit.

6th. That books of subscription were opened within two months after the passing of the statute 1 Wm. IV., c. 12, as thereby required.

7th. That books of subscription were opened under the authority or direction of a majority of the petitioners in such act named before suit.

8th. That persons were directed or appointed before suit by a majority of the said petitioners, to open books of subscription for stock of the said company.

9th. That books of subscription were opened according to the provisions of the act.

10th. That defendant's shares were not before suit forfeited, and such forfeiture assented to and acquiesced in by the plaintiffs.

11th. And that under the plea of *nil debet*, the plaintiffs are entitled to recover under the evidence, consequently that the rule should be discharged.

McLEAN, J.—As to competency of witness, see *Fletcher, v. Greenwell (a)*: under an act of parliament, a local act, the directors and guardians of the poor of a parish were to sue and be sued in the name of their clerk. In an action of assumpsit against him for work done by their order, *held* that a person who was a director at the time the cause of action arose is a good witness for the defendant.

McGahey, vestry clerk of St. Pancras, Middlesex, v. Alston & Sewell (*b*)—the same point decided as in the above case.

12th Vic., c. 70—"An act to improve the law of evidence in Upper Canada." Sec. 1. "That every person so offered may and shall be admitted to give evidence on oath, &c., notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or enquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord, or such person in whose right any defendant in replevin may make cognizance, or any person in *whose immediate or individual behalf* any action may be brought or defended either wholly or in part, or the husband or wife of *such persons respectively*."

Motion to set aside verdict and enter nonsuit on various grounds pursuant to leave ; the principal object being the admission of stockholders as witnesses, on the ground that such stockholders were incompetent to be witnesses. Under the statute 12 Vic. ch. 70, no one is disqualified from giving evidence except such as are specified in the proviso contained in sec. 1. The witnesses objected to in this case, if incompetent, must be so on the ground urged, that this action is brought wholly or in part for the *immediate* or *individual* behalf of these witnesses. Now I think it is quite clear that the action was not brought for their *immediate* or *individual* behalf. They had only a joint interest with others in the company, and could have no immediate or individual interest in the money sought to be recovered, or the proceedings instituted for the recovery of such money. The payment of stock to enable the company to go into operation and carry on the business for which it was incorporated is required by the statute, but no stockholder can have a particular or several interest in any particular portion of the stock ; and the interest in the whole amount is of that uncertain nature that no one subscriber for stock could be rejected on account of it. The value of the stock must necessarily depend upon the success of the company ; and it might happen that the whole stock subscribed might prove a total loss. In 12 M. & W. 559, it was held that a party whose interest was remote or uncertain, even before the passing of the act to improve the law of evidence, was a competent witness ; and Parke, R., says that the question of competency on the score of interest was of little consequence since the passing of that act. I think the testimony of the witnesses was properly received : and the very fact of a stockholder being liable to be sued by the company for money due, confirms me in that opinion. If a partner or stockholder may be sued, what good reason can be assigned why such stockholder may not be a witness in any cause in which the company may be a party, and in which such stockholder may have a remote and uncertain interest. This has always since the argument, appeared to me to be the only

point on which any doubt could be entertained. I quite concur in the view taken by the Chief Justice, with respect to all the points taken on the trial. The rule for a new trial must therefore, in my opinion, be discharged.

McKENZIE V. FAIRMAN.

Trespass for mesne profits.

In an action for mesne profits—*Held per Cur.*, that if the declaration or replication is objectionable from vagueness, the defendant should demur for want of a sufficient description, or a new assignment, and not raise an issue to the country on the fact of identity of the premises mentioned in the declaration, and those mentioned in the 2nd and 3rd Pleas.

The declaration, dated the 25th March 1850, states that the defendant—to wit, on the 27th July, 1849, (not saying *vi et armis*) broke and entered five messuages, five barns, five stables, five outhouses, five yards, five gardens, five orchards, five hundred acres of land, five hundred acres of arable land, five hundred acres of meadow land, five hundred acres of pasture land, five hundred acres of land covered with water, five hundred acres of wood land, and five hundred acres of other land—situate in the township of Pittsburg, in the county of Frontenac—of the plaintiff's; and ejected, expelled, and removed him from his possession thereof, and kept him so expelled, &c.—to wit, from thence until the 14th of March, 1850—and during that time received and took the profits, &c., and did waste, &c., to the said messuages, holdings and lands, improperly tilled the said land, cut down trees thereupon, destroyed fences belonging to the said land, broke doors and windows belonging to the said tenements, &c., whereby the plaintiff lost the profits, &c. of the said tenements, with the appurtenances, and laid out large sums of money in recovering the same, &c.

Pleas.—1st. Not guilty.

2nd. That the closes in which, &c., were not, nor were either of them, nor was any part or either of them, at the said time when, &c., nor are they or either of them, or any part or either of them, the closes of the plaintiff, as in the said declaration alleged, &c.; concluding to the country.

3rd. That the said closes, in which were and now are the closes soil and freehold, and each of them was and is the close soil and freehold of the defendant; wherefore, the defendant of his own right, at the said time when, &c., broke and entered the said closes in which, &c., and committed therein the said several supposed trespasses in the declaration mentioned; concluding with a verification.

Replication—*Similiter* to 1st plea.

To the 2nd plea—That the defendant ought not to be admitted or received to plead the said plea, because after the 27th July, 1849, to wit, in Easter Term, 13th Vic., in the Queen's Bench, the defendant was attached to answer John Doe in a plea of trespass and ejectment—who thereupon complained that the present plaintiff on the 27th July, 1849, demised to the said John Doe five messuages, &c. (enumerating premises as in the above declaration) in the township of Pittsburg, &c., for a term of seven years, &c.; also stating a similar demise of premises similarly described by Wallis S. Fairman, and alleging entry and ouster, &c.; that the defendant appeared and pleaded not guilty, and issue was joined. It then proceeds to state a trial and recovery by the plaintiff, in the second Tuesday of Hilary Term, 1850, and 21*l.* 8*s.* 11*d.* damages and costs, the issuing of the writ of *haberi facias possessionem*, and the delivery of possession thereinunder by the sheriff, on the 13th March, &c.; and the plaintiff then avers that the said five messuages, &c., (repeating the whole) in the said declaration mentioned, are respectively the very same identical five messuages, &c. mentioned in the said first demise, &c., and not other or different; and that the plaintiff and the lessor in that demise are the same identical persons; concluding with a verification and prayer for judgment, &c.

To the 3rd plea—a similar replication to the last, in the very same terms, averring that the said five messuages, &c. in the said declaration mentioned, are respectively the very same identical five messuages, &c., mentioned in the said first demise, in the said recovery, record, and proceedings mentioned and set forth, and not other or different; averring

also the identity of the plaintiff with the lessor in such demise ; concluding by estoppel, &c.

Rejoinder to replication to 2nd plea—that the said five messuages, &c. (enumerating the whole) in the said declaration and in the said second plea mentioned, are not respectively the very same identical five messuages, &c., mentioned in the said first demise, &c., in manner and form as in the said replication mentioned, concluding to the country and *similiter*.

The replication to the third plea precisely similar to the last.

At the trial of the cause before Mr. Justice Draper, at the Spring Assizes, 1850, held in and for the united counties of Frontenac, Lenox, and Addington, the plaintiff proved that the ejectment and recovery pleaded, was brought for Lot No. 36, in the first concession of Pittsburg, of which possession was delivered to him, under the writ of *haberi facias possessionem*, on the 12th March, 1850, and for which this action was brought.

The defendant put in the will of his father, which was admitted ; it is dated the 3rd January, 1823. It was also admitted that the testator died seised of the west half of lot No. 30, in the 1st con. of Pittsburg ; it is devised (as containing 100 acres) to his sons Wallace, Warner, and Daniel, and to his wife, to be equally divided between his said son Wallace and his wife, until his sons Warner and Daniel became of age, when it was to be divided into four equal parts, and one-fourth part owned and possessed by each until her death, and then her fourth part to be equally divided between his aforesaid sons for ever. A verdict was then rendered for the plaintiff, with one shilling damages, subject to the opinion of the court on the whole case, whether the plaintiff was entitled to recover ; and if not entitled to recover, then that a verdict be entered for the defendant.

MACAULAY, C. J.—No question has been raised whether the plaintiff could reply the estoppel to the second plea, which concludes to the country, and did not let him in to reply new matter ; the same course seems to have been

taken in the case cited from 10 A. & E. 736, but it is questionable.—See 2 Smith's Leading Cases, 445; 2 Ex. R. 368.

The objection does not apply to the replication to the third plea. Neither the declaration nor the pleas ascertain the premises by name or description; nor does the declaration call them closes, but so many messuages, acres of land, &c., but the pleas refer to them as the several closes in which, &c., treating each messuage and each separate parcel or quantity of land as a separate close. The replications are equally indefinite, and only allege identity of the ejectment and declaration, omitting the pleas which such replications are designed to meet, and which pleas the defendant seeks to import into his traverse of the replications.

Had the replications described the premises recovered in the ejectment specifically, according to the facts, they would have virtually amounted to special new assignments, as perhaps they substantially are, coupled with the traverse of identity; and the only question on a traverse of the identity would have been, whether the premises so described were the premises intended in, and for which the ejectment was brought. Framed as the pleadings are, a question of fact is raised on the subject of identity, and the substance of the issue is the only matter to be tried. Then what is the substance of the issue, and on whom is the *onus probandi*? Had the plaintiff traversed, or taken issue on the second and third pleas, the issue would have been whether the closes in which, &c., were the closes of the defendant or not, and the affirmative would be on him. At the trial, the plaintiff might begin by proving damages to the close he meant, when the defendant in support of his pleas, would prove title to other closes which he meant; and in that event, according to the old rule of evidence applied to the common bar, or plea of *liberium tenementem*, the defendant would be entitled to recover; the plaintiff might however say, that as the defendant might now have demurred to the declaration, for uncertainty, under the new rules (a), which he could not have done formerly, he acquiesced in the close intended by the plaintiff; in short, that the rule was

(a) Cameron's Rules, 60, No. 5

reversed, wherefore he could not shew title to any other closes than those which the plaintiff intended in his declaration. In 3 A. & E. 181, Lord Denman, C. J., said, "I think that under the new rules, the defendant, if he does not demur, is bound by the description he has adopted, and with respect to which he feels certainty sufficient to enable him to plead a justification of the alleged trespass—referring to the cases 1 B. & C. 489, 7 A. & E. 843, in this case there was a description by abuttals, but imperfect, and which might have been demurred to. If the same remarks would equally apply to a case of general description like the present, there is an end of the case; if not, still the pleas are as vague and indefinite as the declaration, and do not, as perhaps they ought to have done, describe the closes which the defendant supposes the plaintiff in his declaration refers to, and which the defendant asserts to be his (a). Then the plaintiff, instead of traversing the pleas, assumes that both he and the defendant mean the same closes, and protests against the defendant's setting up title thereto, on the ground of the estoppel arising from his former recovery thereof in ejectment, against the defendant; in doing this he admits or assumes the premises mentioned in the declaration and pleas to be identical, and avers identity of those recovered in the ejectment with those in the present declaration, but not including the pleas in the averment of such identity.

In answer to these replications, the defendant does not deny the plaintiff's recovery in ejectment, as alleged; he does not plead *nul tiel* record, or state that such ejectment was brought for other and different premises, describing them; but by way of rejoinder he traverses the alleged identity of the premises sued for and recovered in the ejectment, and those mentioned in the declaration, and includes the pleas, as if the identity of the closes therein mentioned, had been also alleged by the plaintiff in the replication. It is not denied that the plaintiff obtained a judgment in ejectment for premises similarly described as in the declaration; for if they varied, the defendant should have pleaded *nul tiel*

(a) 2 A. & E. 26; 11 A. & E. 655.

record—but impliedly admitting their ostensible identity, he denies their identity in fact. The effect seems to me to be, that in the pleadings the parties must be taken to agree as to the closes meant in the declaration and pleas, and only dispute the identity of the ejectment therewith.

Upon the issues thus joined, the affirmative or *onus probandi* was upon the plaintiff, and he was entitled to begin. He proved the premises for which the ejectment was brought. This was a matter susceptible of proof through the medium of the service of the declaration on the tenant in possession; the consent rule (which ought to specify for what the tenant defended) and the execution of the writ of *haberi facias possessionem*, and of the general descriptions contained in the pleadings, it was the only one capable of distinct proof. As to the declaration and pleas, it depends upon what the plaintiff and defendant respectively assert them to mean. Independently of the intendment, the judgment in ejectment was proved in evidence, and the declarations in that one case and the present correspond, and the trespass in the declaration is laid on the day of the demise in the other; both, however, being general proof of the premises for which the ejectment was brought, does not (except presumptively) shew that the present action for mesne profits is for the same. The plaintiff so alleged and proved damages accordingly, and there was nothing to prove the contrary.

The affirmative being with the plaintiff, the right to elect the application of the declaration to the premises so recovered, would, in the ordinary course, rest with him, as it might with the defendant, had the plaintiff traversed his pleas.

To meet this *primâ facie* case the defendant not contesting such identity, *i. e.* the identity of the premises recovered in the ejectment and mentioned or intended in the declaration, sought to avoid it, not by proving another recovery in ejectment for other premises, or another lot of land, but by proving title to an undivided portion of another lot, and then asserting that in his pleas he meant such lot and not the premises recovered by the plaintiff in the ejectment, relying on his right to plead generally the common bar, and

to prove title to a close, in the absence of any new assignment. It is not, however, a question of title, but of identity, in relation to which I apprehend the ejectionment pleaded by way of estoppel, and the proof of the premises recovered, amounted virtually to a new assignment—the premises mentioned in the declaration being thereby explained to mean those recovered in the ejectionment, and we hear of no other ejectionment.

The pleas do not shew what is meant any more than this declaration, and the declaration in ejectionment; the plaintiff does not dispute the defendant's title as pleaded (nor does he admit it) (*a*), but supposing both to mean the same premises, he sets up the ejectionment and avers identity as an estoppel. The premises meant in the ejectionment, that is for which it was brought, were capable of proof and were proved, so much was therefore made certain by evidence; and the consequence of the plaintiff's recovery and entry under the writ of possession, entitled him to maintain an action for mesne profits from the day of the demise, corresponding with the day laid in the declaration, and the defendant is estopped (*b*). Then, how is the defendant to make out that the premises in the declaration and ejectionment are not identical? They are identical upon comparison, and identified with the premises in question, by proof that the ejectionment was brought therefor, viz., for lot No. 36, in the first concession of Pittsburg. The defendant shews no other similar recovery for other lands, to create an uncertainty or repel the presumption of identity otherwise existing. To prove a recovery in ejectionment for the lot of land he alleges his plea to relate to, would have been a suicidal step, as it would establish the plaintiff's right to recover in respect of those premises, by the defendant's own shewing. Without proof of anything tangible to rebut the plaintiff's case, the defendant merely says he meant to plead title to the west half of Lot No. 30, in the same township, and not the lot which the plaintiff proved he had recovered in the ejectionment relied on by him as an estoppel; and, without proof of actual possession or other right, he offered his

(*a*) 4 M. & G. 783, 795.

(*b*) 10 A. & E. 763; 2 Ex. R. 368.

father's will as proof of his title ; but as it depends on identity and not on title, proof of title does not prove that he meant the west half of lot No. 30, any more than lot No. 36 ; there is nothing to indicate it—it is a mere assertion—and he might as well say he meant lot No. 1, in the fourth concession, or any other lot or part of a lot—allegations which leave the plaintiff's proof of identity untouched. If, therefore, the plaintiff made out a *primâ facie* case, the defendant did not rebut it, unless he had in his turn a right to elect and apply his pleas to any lots or closes he pleased to name, or could prove himself possessed of or entitled to. In my opinion, he had not in these pleadings this right of election and application, in answer to *primâ facie* affirmative evidence of the plaintiff.—11 A. & E. 665.

If the vagueness of the declaration or the replication was objectionable, the defendant should have demurred for want of a sufficient description or a new assignment, and not raised an issue to the country on the fact of identity.

I think, therefore, the *postea* should be for the plaintiff.

McLEAN, J., and SULLIVAN, J., concurred.

THOMPSON ET UX. V. WILSON.

Assumpsit on a promissory note, payee against the maker, for £75. Plea—That as to 50*l.*, parcel of the note declared on, defendant before the note became due, made a promissory note for and on account of the sum of 50*l.*, parcel, &c., payable three months after date, to the plaintiffs or order, which the plaintiffs then accepted and received for and on account &c. ; that there was no other consideration for the note of 50*l.*, and that before it became due it was endorsed by the plaintiffs to one McLaren ; and the same note and the note mentioned in the declaration were at the commencement of this suit, outstanding against the defendant. Replication—That the note for 50*l.* became due and payable before the commencement of this suit ; but the defendant did not, at any time, pay the amount, or any part thereof ; and that plaintiffs, before and at the commencement of this suit, held and now hold the said note unpaid and unsatisfied. Replication held bad on special demurrer.

Summons issued 12th of April, and declaration dated 17th of May, 1850.

The plaintiffs declare as payees, against the defendant as maker of a promissory note, made the 2nd July, 1849, for 75*l.*, payable six months after date, to the plaintiffs, (not stated, or order).

4th plea :—As to 50*l.* parcel of the sum mentioned in the said note—that after making thereof, and before it became due, and before suit, to wit, on the 4th of January, 1850,

it was agreed between the plaintiffs and the defendant, that the defendant should make a promissory note, for and on account of the said sum of 50*l.*, parcel, &c. and payable three months after the date, to plaintiffs, or order, and that the defendant afterwards, and before the note declared on became due, and before suit, to wit, on the day and year last aforesaid, in pursuance of the said agreement, made and delivered to the plaintiffs such note for 50*l.* as aforesaid, for and on account of the said sum of 50*l.* above mentioned, and that the plaintiffs then accepted and received the same, and the defendant became and was and is liable to pay the same, according to the effect thereof; that there was never any other consideration than as aforesaid for the said note, and that before it became due, to wit, on the day and year last aforesaid, the said note was endorsed and delivered by the plaintiffs to William P. McLaren, and the same and the said note mentioned in the declaration were at the commencement of this suit outstanding against the defendant, &c.

Replication:—That the said note for 50*l.* became due and payable, according to the tenor and effect thereof, before the commencement of this suit, to wit, on the 6th April, 1850; but that the defendant did not nor would, when the same became so due and payable, or at any time before or since, pay the amount or any part thereof; and that the plaintiffs, before and at the time of the commencement of this suit, held and now hold the said note, unpaid and unsatisfied, although the defendant hath been requested to pay the same.

Demurrer, the causes being specially assigned:—

1st. That the said replication confesses the matters in the said fourth plea alleged, without avoiding the same.

2nd. That it argumentatively denies the endorsement of the said note to the said William P. McLaren, and that the same was outstanding at the commencement of this suit, by alleging that at that time the plaintiffs held the said note.

3rd. That it does not deny the said alleged endorsement to McLaren, except argumentatively, nor shew how the plaintiffs obtained the same from him.

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4th. And argumentatively denies that McLaren was holder thereof at the commencement of this suit.

Joinder in demurrer:—The demurrer was argued in Trinity Term, 14th Victoria, when

M. C. Cameron, for the demurrer, contended, that the replication was an argumentative denial of the alleged endorsement to McLaren, and also of his being holder, and of the note being outstanding, without shewing how the endorsee ceased to hold and the plaintiffs became repossessed.—8 M. & W. 629; *Fraser v. Welch*, 15 M. & W. 672. That it must be presumed the note is outstanding in the hands of McLaren, or some other than the plaintiffs, until the contrary is shewn, as that the plaintiffs had retired it, whereas they do not shew by what mode, or in what manner they became holders again; that the replication is taken from a form not applicable.—See *Chitty jr's Forms*, p. 280, sec. 3; 1. Gale 77.

Leith, for plaintiffs, contended, that the term outstanding, in the defendant's plea, meant not in the hands of McLaren or some one other than the plaintiffs—2 M. & W. 20, *Goldshed v. Cottrell*; but related to time, and meant outstanding and not due at the commencement of the suit; that McLaren, being admitted to be endorsee, must be presumed to continue holder until the contrary is shewn; but that the plaintiffs allege themselves to be holders, which is sufficient without otherwise shewing how McLaren ceased to be such holder.—4 M. & G. 804; *Mercer v. Cheese*, as overruled by 16 M. & W. 232, *Price v. Price*; 8 M. & W. 629; 7 U. C. R. 33.

MACAULAY, C. J.—The plea (like pleas in many of the cases) has its origin in the case of 5 T. R. 513, *Kearslake v. Morgan*. This and subsequent decisions establish, that the making and delivery of a negotiable promissory note to the plaintiffs, whether of the defendant or of a stranger, for and on account of the whole or part of a debt not yet due, as in the present case, or already due, is (as distinguished from the making and delivery of such a security in satisfaction and discharge of the debt) a good plea, not, absolutely in bar of the demand, but in suspension of any right of action

while such security is running and not due, or is outstanding against the defendant, in the hands of another person than the plaintiffs.—Whitw. 324; 16 M. & W. 232; 2 Wil. 352; 1 Exsp. 4; 16 M. & W. 240; 4 Bing, 454; 1 M. & P. 223; 5 Tyr. 619; 2 C. & J. 405; 2 C. M. & R. 157; 3 Dow. P. C. 813 O. C.; 5 B. & Adol. 925; N. & M. 167, O. C.; 2 Dow. N. S. 619; 2 C. & M. 617; 1 D. & L. 491; 4 M. & 9. 804; 5 Scott N. R. 664 O. C.; 2 Dow. & L. 410; 6 M. & G. 40; 3 D. & L. 372; 13 M. & W. 58 & 829 2; Ex. 798; Finlayson's Leading Cases, 72-73 and notes, and 118 and 119. The sufficiency of the plea, and whether it should have averred that McLaren continued to be, or that some other person unknown to the defendant was the holder of the note for 50*l.*, at the time of action brought, has not been raised by marginal note to the demurrer books, or in the argument; but the plaintiff, treating is as good in law, has answered it by a replication.—3 Dow. P. C. 813. Under such circumstances it must be presumed, from the endorsement to McLaren and the allegation that the note was outstanding, that he continued to be and was the holder at the commencement of the suit, unless the contrary is shewn by a sufficient replication. The remark of Parke, B., in *Price v. Price*, 16 M. & W. 242, applies here with additional force. In observing, upon the objection that the replication was bad for not averring that the plaintiffs continued to hold the over-due note mentioned in the plea, he said, that according to the principles of pleading, it is to be intended that the note remains as it was, and that no order had been made by the plaintiffs as now was averred, it is to be presumed there is none until the defendant pleads it, although the fact, whether endorsed or not, lies more in the plaintiffs' knowledge than the defendant, "In the case of a declaration, the rule that a party is to plead facts within his own knowledge, gives way to the rule that things are to be presumed to continue in the same state till the contrary appears." I may also mention, as relevant to this subject, 11 A. & E. 403; 12 A. & E. 356; 8 M. & W. 632; 14 M. & W. 735; so that, independently of the allegation that the note was outstanding, which is no doubt of equivo-

cal import, and may mean outstanding in the hands of others or of the plaintiffs, the presumption is, that McLaren continued the holder, although it is not averred.—2 M. & W. 20 : 16 M. & W. 237.

The want of an averment that the endorsation was for value, although usual in pleas of the kind, does not seem important.—14 M. & W. 738 ; 4 Q. B. 737 ; 3 Q. B. 89.

As to the sufficiency of the replication, it is distinguishable from some of the cases cited in two respects:—1st. The promissory note for 50*l.* was given before the note declared upon became due ; and, therefore, the plea is in excuse of non-performance of the promises to pay therein contained, as to the 50*l.* part thereof. 2ndly. The plea does not allege the note declared upon to have been parted with by the plaintiffs ; indeed it does not appear to have been negotiable ; but alleges that the note for 50*l.*, made after the note declared upon, and before it became due, which was negotiable, had been endorsed and delivered (not saying for value) by the plaintiffs to McLaren.

It is unlike the precedents, in omitting to state that McLaren or some other person than the plaintiffs, continued to hold the note at the time the action was brought, leaving it to rest on the presumption of law that McLaren continued holder, and the averment that it, as well as the note declared on, was outstanding at that time.

The replication takes no notice of the allegation, that the note declared upon was outstanding ; it treats it as meaning only outstanding against the defendant in the plaintiffs' hands, as it must be presumed, not being negotiable, nor alleged to have been assigned, or treats it as an immaterial or repugnant allegation, without more, not requiring to be noticed in reply.—7 M. & W. 486 ; 8 M. & W. 890 ; 1 M. & W. 153 ; 2 M. & W. 18 4 M. & G. 804 ; 2 C. M. & R. 704 ; 6 M. & W. 559 ; 7 M. & W. 486 ; 8 M. & W. 890 ; 8 M. & W. 629 ; 13 M. & W. 828 ; 2 C. M. & R. 159 ; 3 Dow. 752 ; 14 M. & W. 733 ; 15 M. & W. 672 ; 16 M. & W. 232 ; 1 Ex. 862 ; 1 Ex. 608 ; 11 Ju. 299 ; 12 Ju. 310 ; 11 Ju. 353 ; 11 Ju. 1043 ; 12 Ju. 246 : 7 U. C. R. 33, which refers to 1 U. C. R. 178, which seems to govern this case.

Then so much of the replication, as alleged that at the commencement of the suit the plaintiff was the holder of the bill, was in the usual form, and the objection was to the formality of the traverse; it was not contended that the traverse was immaterial, and in 12 Ju. 146, Lord Denman, C. J., in reply to the argument that the plaintiff, instead of traversing the allegations of the persons named in the plea being holders, should have shewn affirmatively how the bill, which he admitted to have been endorsed and delivered to them, came back, said, "that a traverse was the only mode of pleading that could be adopted by the plaintiff, who could not plead in confession and avoidance, without admitting that the persons named in the plea were the holders at the time of the commencement of the suit; that the special matter could only be stated by way of inducement, and the replication must have concluded with a traverse of that which was admitted to be a material and necessary averment in the plea; a point expressly decided in *Fraser v. Welch*, 8 M. & W. 629, where the correct form of replication was given." The replication is taken from a form applicable only to a plea not alleging any transfer of the bill or note.—1 H. & W., *Atkinson v. Hawdon*; 2 A. & E. 628; 4 N. & M. 409.

On these authorities, I think the replication must be held bad in form, and that judgment should be for the demurrer.

McLEAN, J., and SULLIVAN, J., concurred.

McLEAN v. YOUNG.

A enters into an agreement in writing, signed by him only, as follows:—In consideration of 70*l.* paid in hand by B., I hereby agree to sign a lease of lot No 32, in the 2nd concession of Etobicoke, directly the same is drawn up by the solicitor, in the following terms, viz. :—To let B. have the farm for seven years, commencing from the 1st of April, 1848, at 70*l.* per annum; the first payment having been this day paid by the said B. (the receipt being acknowledged), and the next payment on the first of April, 1850, and so on. If B. wants to give up the farm before the expiration of four years, he is to pay 140*l.* to me; if after four years, then 70*l.* If I want to sell the farm, then I am to pay B. on the same terms. Six months' notice to be given to either party. I am to put up a frame barn, to be completed, &c.—also a house, &c.; also to split 4000 rails, and have them ready for hauling by the 1st of January, 1848; and to secure whatever wheat B. puts in this fall by fence. B. is to have his firewood, &c.; and if he puts in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off. *Held, per Cur.*, that such an agreement is not a lease creating a term of years, but is only an executory agreement. *Held* also, that in this case debt for use and occupation, and not debt on the demise is the proper form of action.

The declaration dated the 16th of April; the summons having been issued on the 4th of April; debt for 100*l.* on the 2nd of April, 1850, for the use and occupation of a certain messuage, farm and land of the plaintiff's, by the defendant, at his request, and by the sufferance and permission of the plaintiff, for a long time had, held, occupied, possessed, and enjoyed, to be paid by the defendant to the plaintiff; whereby, &c.

Plea—*Nil debet.*

The principal facts in this case are—That Matthew Priestman formerly owned lot No. 32, in the 2nd concession of Etobicoke, containing one hundred acres, more or less; that he sold and conveyed the same in fee to James Austin, who then, by indenture, bearing date the 26th July, 1845, leased the premises to the said Matthew Priestman, for five years from the 28th July, 1845, at a yearly rent of 35*l.*, payable half-yearly, with a covenant on the part of the lessor, to reconvey the estate in fee to the said lessee upon payment of 300*l.*, giving six months' notice of his intention so to do; that on the 30th of September, 1847, the said Priestman signed a written agreement, as follows:—

“In consideration of 70*l.* paid in hand by Alex. Young, I hereby agree to sign a lease of lot No. 32, in the 2nd concession of Etobicoke, directly the same is drawn up by the solicitor, in the following terms, viz.:—‘To let Alexander Young have the farm for seven years, commencing from the 1st of April, 1848, at 70*l.* per annum—the first payment having been this day paid by the said Young (the receipt being acknowledged), and the next payment on the 1st of April, 1850, and so on. If Alexander Young wants to give up the farm before the expiration of four years, he is to pay 140*l.* to me; if after four years, then 70*l.* If I want to sell the farm, then I am to pay Young on the same terms. Six months' notice to be given to either party. I am to put up a frame barn 42 feet by 60 feet, to be completed and in a fit state for grain by the 1st of August, 1848—also a frame or stone house, not under 24 feet by 20 feet, by the 1st of July, 1848, good and fit to inhabit—also a frame shed, 40 feet by 14 feet, by the 1st of September,

1848; also to split 4000 rails, and have them ready for hauling by the 1st of January, 1848; and to secure whatever wheat Young puts in this fall by fence. Young is to have his firewood (from 33 and 34, 3rd concession) from me for nothing; and if he puts in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off.'

"Dated this 30th September, 1847.

His
(Signed) MATTHEW + PRIESTMAN.
mark.

Signed in presence of, it being first read over, and he appearing to understand it.

(Signed) JOHN ELLIOT.

(In the margin)—If I rent the three acres on which there is a mill-site, I am to pay Young 15s. per acre, and he is to let me have it.' "

That defendant was immediately put and entered into possession; that Priestman soon after died without executing the lease, but made a will, dated the 25th of October, 1847, whereby he devised and bequeathed to his wife Martha all such property as he died possessed of, or in any way entitled to, real as well as personal, &c., to hold to her, her heirs, executors and assigns, &c.; and appointed her and William Priestman as executrix and executor, both of whom, after his death proved the will, and administered, &c.—said Priestman having died indebted, the creditors of his estate filed a bill in Chancery to make the interest which he had in the lot of land in question available towards the satisfying of their debts; that, pending the proceedings under such bill—to wit, on the 14th of April, 1849—the defendant applied to the Court of Chancery for indemnity, setting forth that the testator's solicitor drew up a lease according to the aforesaid agreement, to the defendant, but that Priestman departed this life without executing it; that the buildings and fences therein mentioned were not erected, &c., whereby the defendant suffered damages; that the

defendant applied to the testator's widow for a specific performance, but it was ultimately agreed by deed, under the hands and seals of the said defendant and the said widow, bearing date the 19th of January, 1849, to refer the question of compensation for the damages aforesaid to arbitrators; and that the umpire, on the 21st of January, 1849, awarded 16*l.* 13*s.* 4*d.* to defendant, to be paid by the 1st of April, 1849; that in order to facilitate the sale of the said premises, the defendant, on the 28th of February, 1849, at the request of the said widow, undertook, in writing, that on payment of 70*l.*, pursuant to the terms of the aforesaid agreement of reference to arbitration, and the aforesaid sum of 16*l.* 13*s.* 4*d.*, &c., to give up possession of the said lot and all his estate and interest therein, unto any purchaser of such lot, to be sold by auction, under a decree in Chancery, on the 1st of March, 1849, which decree saved his rights; that the premises were sold under such decree, wherefore he claimed compensation—namely, the aforesaid sum of 70*l.*—the sum awarded, 16*l.* 13*s.* 4*d.*: twenty-one acres of wheat, 26*l.* 5*s.*; damages to hay, 3*l.*; costs, 38*l.* 5*s.* claiming in all 154*l.* 3*s.* 4*d.*: on the 1st of November, 1849, the defendant made a further application for damages in lieu of the 70*l.*, if not allowable, and was allowed in compensation, according to such application, the sum of 60*l.* That under a decree of the Court of Chancery, dated the 22nd of April, 1848, all the interest of the testator in the said lot was sold to the plaintiff for 240*l.*; and by an indenture, dated the 17th of January, 1850, assigned by the widow and William Priestman to him and his heirs, with the approbation of the Master in Chancery, subject to the aforesaid reserved rent to the said Austin, and to the reserved said agreement for a lease to the defendant.

This indenture is between Martha Priestman, widow, of the first part, and the plaintiff of the second part (William Priestman not being a party thereto).

1st. It recites the lease from Austin to Priestman, of the 26th July, 1845, and the privilege to purchase the fee therein contained.

2ndly. That Priestman *afterwards* parted with the posses-

sion of the demised premises to the defendant (who is now in possession of the same), under an agreement for a lease to him thereof, at the yearly rent or sum of 70*l*.

3rdly. That afterwards Priestman made a will, and devised to his wife all such property, &c., the appointment of her as executrix and William Priestman as executor, his death, and their assumption of administration.

4thly. The decree for sale, dated 22nd April, 1848.

5thly. That on the 30th August, 1849, all the right and interest of the said Matthew Priestman, deceased, in the said lot No. 32, in the 2nd concession of Etobicoke, under the said demise, and the previous agreement therein contained for the purchase of the said premises, and subject to the lease, were put up for sale and sold to the plaintiff, subject as aforesaid, at 240*l*.

6thly. Said Martha Priestman, according to all her estate, right, title, and interest in the land and premises aforesaid, and so far as she can or may at law or in equity, as such, devise as aforesaid, but not further or otherwise, bargained, sold, assigned, released, &c., to the plaintiff, his heirs and assigns the said demised premises, and all such right, title, estate, and interest of the said Matthew Priestman, deceased, of, in, and to the said lot, as in and by his said will was devised and bequeathed, and became vested in the said Martha Priestman as such devisee as aforesaid; together with the said indenture of lease (from Austin to Matthew Priestman) and the benefit of all covenants, &c., therein, on Austin's part for the sale thereof, &c., *habendum* to plaintiff, his heirs, executors, administrators, and assigns, for ever—subject, nevertheless, to the aforesaid reserved rent to the said Austin, and to the said agreement for a lease to the said defendant.

7thly. Covenant against incumbrances by the said Martha Priestman, and the deed executed by Martha Priestman only.

The plaintiff, under the above-mentioned deed of assignment, claimed in this action rent from the defendant—from the 1st of April, 1849, to the 1st of April, 1850—amounting to 70*l*. Under the direction of the learned Chief Justice of

Upper Canada, before whom the case was tried, the jury found a verdict for the plaintiff, with 17*l.* 10*s.* damages, being at the rate of the rent mentioned in the agreement with Priestman, from the 17th of January to the 1st of April, 1850, with leave reserved to the plaintiff to move to increase the verdict, and to the defendant to move to set it aside and enter a verdict for the defendant. Cross rules were accordingly obtained; that moved on the plaintiff's behalf calling on the defendant to shew cause why the verdict should not be increased to 70*l.*, and the one moved on the defendant's behalf calling on the plaintiff to shew cause why the verdict should not be set aside and entered for the defendant, or a nonsuit be entered, or why the verdict should not be reduced to the amount which would have accrued from the date of the deed to the issuing of the process; or a new trial be had, the verdict being contrary to law and evidence, and for misdirection.

Muttlebury, for the plaintiff, on the argument, contended, that the defendant having entered under Priestman, and the agreement under which he entered still subsisting, as shewn by the defendant's applications to the Court of Chancery, and the reservations in the deed to the plaintiff of the 17th of January, 1850, he was liable to pay rent at the rate therein mentioned; and that being a yearly rent, and as the plaintiff became entitled, under the devisee and executors of Priestman, through the decree and sale in Chancery, before the rent accrued for the year ending the 1st of April, 1850, he was entitled thereto: that the plaintiff as assignee of the reversion, was not only entitled to the accruing rents, but to sue therefor in this action: that a sufficient privity to entitle him to recover was shewn, without other proof of acknowledgment or occupation than was given: and that the rent was not apportionable, so as to limit the plaintiff to the date of the deed of assignment to him: and that the defendant cannot dispute his title; at all events, that the plaintiff was entitled to retain the present verdict. He cited 16 East, 99; *Lumley v. Hodgson*, 6 Price, 167; *Hull v. Vaughan*, 5 T. R. 4; St. 11 Geo. II. ch.

19 sec. 4; 1 Q. B. 850; 5 B. & Ad. 326; 3 B. & C. 482; 4 Esp. 59; 5 Taunt. 519; 7 Simons, 151.

Hawke, for defendant, contended, that there was no proof of occupation or enjoyment, or that the defendant held by permission of the plaintiff; that if liable, the defendant was entitled to deduct the damages sustained by reason of the default on the part of the lessor; that the proper remedy is debt on the demise, and not debt for use and occupation, the defendant not having in fact occupied under the plaintiff—at all events not prior to the 17th January, 1850; that the plaintiff's particulars claimed only one year's rent, and he is bound thereby.—8 M. & W. 118; 8 M. & W. 571: 6 A. & E. 854.

MACAULAY, C. J.—It forms a question of some nicety, whether the instrument of the 30th of September, 1847, constituted an executory agreement only, or a lease creating a term of years (*a*). This, according to the books, is to be determined by the predominant intention of the parties (*b*), as it is to be collected from the whole agreement (*c*), in connection with and elucidated by the surrounding circumstances, and to a certain extent the acts and conduct of the parties (*d*), including the right to present or immediate possession (*e*) and entry accordingly, although not aided by the mere letting into possession (*f*), or collateral acts (*g*). The cases clearly establish that an agreement containing words of present demise, or of equivalent import, will, if such be the intention, constitute a lease, notwithstanding express provision being made therein for the execution of a formal lease, which (in such event) is looked upon as for further assurance (*h*).

Some cases distinguish between agreements containing words equivalent to a present demise, and other's merely undertaking to give leases at future periods (*i*). And vari-

(*a*) 2 T. R. 744; 6 East 535. (*b*) 7 M. & G. 980. (*c*) 5 T. R. 167; 12 East, 170; 5 B. & C. 41; 3 Taunt. 72; 1 M. & W. 231; 6 M. & G. 182; 7 M. & G. 988; 12 M. & W. 478; 4 M. & W. 720. (*d*) 1 T. R. 735; 5 T. R. 163; 3 Taunt. 66; 8 Bing. 178, 353; 4 B. N. S. 187; 9 A. & E. 644; 7 M. & G. 980, 993. (*e*) 2 W. B. 973. (*f*) 9 A. & E. 644, per Littledale, J. (*g*) 7 M. & G. 993; 4 M. & W. 716. (*h*) Cro. Eliz. 33; Hob. 34; Noy. 57; Moore 459, 861; 3 Bul. 204; 2 Blk. 973; 15 East, 244; 8 Bing. 178; 4 M. & W. 704. (*i*) 2 Taunt. 148; 6 M. & W. 549.

ous tests are applied, according to the peculiar working and circumstances of the different cases—such as the description or identity of the premises to be demised, the commencement or duration of the term, the amount of the rent, the right to possession, &c.

It will be found, upon a comparison of the present agreement with those mentioned in the adjudged cases in England, that it contains some of the *indices* by which such agreements have been held to be leases, and not mere executory agreements therefor—such as the lessor and the lessee, the premises, the beginning and ending of the term, the annual rent and part payment thereof, an implied authority to enter and possess, and the other terms on which the lands were to be demised; while on the other hand, it also contains provisions which have been adopted as satisfactory proof that no demise was intended or created—such as agreeing to sign a lease to be prepared, the commencement of the term being *in futuro*, the possession in the meantime not being specifically provided for (*a*), the sum paid in advance not being exclusively for the first year's rent, but partly as a consideration for a lease for seven years, &c. (*b*), the instrument being that of the landlord only, and not signed by the lessee (*c*).

Between the conflicting tests, it is to be determined what is the construction to be placed upon the instrument.

Upon the best consideration, the most satisfactory inference appears to me to be, that it is an executory agreement only, and not in itself an executed demise. The cases will be found noted in Crabb's Law of Real Property, sec. 1281, and the following sections; Archbold's Landlord and Tenant, pages 19, 20, 22, 57, 58; Archbold's Law of N. P. P 339; and other text books. Also see 2 Taunt. 148; 6 Bing. 206; 5 M. & W. 104; 6 M. & W. 549; 6 A. & E. 265; 7 A. & E. 451; 9 A. & E. 644; 6 M. & G. 173; 7 M. & G. 980; 1 Q. B. 516; 7 M. & G. 990.

In 7 M. & G. 990, Tindal, C. J., said—"Here there was no previous possession, and no possession is stipulated for.

(*a*) 3 Taunt. 67. (*b*) Bing. 590; 5 B. & A. 322; 6 M. & W. 549. (*c*) 12 M. & W. 479; 4 Bing. N. S. 187.

It is quite uncertain when the actual occupation is to begin." 6 A. & E. 245.—"But it seems to have been considered that sufficient opportunity was left for preparing a formal lease, there being no immediate possession or agreement for immediate possession." The second test suggested in many of the cases therefore fails. To constitute a lease, it is necessary that it should appear that the parties contemplated the creation of a present interest in the subject matter (a), or as said in note a, 7 M. & G. 991, a present *interesse termini*—a presently vested right to enter and take possession, either immediately or at a future period, as the *habendum* may be (b).

In the agreement in writing bearing date the 13th day of September, 1847, signed by Priestman alone, he says—"In consideration of 70*l.* paid in hand by Young, I hereby agree to sign a lease of lot No. 32, &c., directly the same is drawn up by the solicitor, in the following terms, viz., to let Young have the farm for seven years, commencing from the 1st of April, 1848, at 70*l.* per annum—the first payment having been that day paid by young—viz., 70*l.*—and the next on the 1st of April, 1850, and so on."

This shews that the 70*l.* paid was the consideration for such lease, as well as the first year's rent, and not therefore paid strictly and exclusively as rent, which indeed it could not be if no lease or term subsisted: it would rather partake of the character of a sum in gross as distinguished from rent.

Then Priestman does not in so many words agree to let, or lease, but agrees to sign a lease directly it is drawn, in terms clearly prospective, and certainly not in themselves a present demise, unless that construction is to be placed upon them by reason of what followed. When the agreement is perused throughout, it will be found that what follows, although worded in the present tense, is consistent with either a present demise or with provisional terms to be incorporated in a future lease, and therefore will not warrant an extension of the foregoing terms beyond their own natural import. The clause relative to 4000 rails is,

however, to be excepted. It says, "If Young wants to give up the farm before the expiration of four years, he is to pay 140*l.* to me; and if I want to sell the farm, then I am to pay Young on the same terms. Six months' notice to be given by either party. I am to put up a frame barn, &c., by the 1st of August, 1848 (a period of four months after the time fixed for the commencement of the term); also a stone house, &c., by the 1st of July, 1848, (three months after the 1st of April of that year); also a frame shed, &c., by the 1st of September, 1848 (five months after the term was to begin). Young is to have his firewood from 33 and 34, &c.; and if he puts in fifteen acres of wheat, at the expiration of his term, he is to have the privilege of taking it off. If I want the three acres on which there is a mill-site, I am to pay Young 15*s.* per acre, and he is to let me have it." All this is expressed as if the instrument were itself a demise, and no doubt strongly favours the argument for that construction. Still, taking the whole together, what was the predominant intention? The instrument is one-sided, and is signed only by the landlord. The defendant did not join in and execute it, as also bound; and although in his favour it afforded proof of the payment of the 70*l.*: it did not prove it as in favour of Priestman, beyond the presumption arising from the defendant's acceptance of it from Priestman. As respects possession, all that appears is the clause whereby Priestman agreed to split 4000 rails, &c., by the 1st of January, 1848, and to secure by fences whatever wheat Young put in that fall, which imports that Young was to be at liberty to put in wheat before the commencement of the term; but whether to have full possession or only partially, as far as the ground might be tilled by him concurrently with Priestman, is quite uncertain; for the latter was to split 4000 rails by the 1st of January, and to secure by fences whatever wheat Young put in. It was not incumbent on Young to enter or put in wheat; and the duty on Priestman to secure it, accords as well if not better with his continuance in possession until the 1st of April, 1848, subject only to leave and license to Young to put in wheat in the Autumn of 1847, as with an immediate

right of entry and possession by Young six months before the term was to begin. If it could be read that Priestman thereby agreed to let, rejecting or treating as parenthetical the intermediate words, it might bear the construction of being a present demise; but without looking to that part of the agreement, the premises to be demised are not ascertained; and this consideration is material, as the case of *Chapman v. Town* (a) shews. In the agreement before us there are no words of present demise, as in the above case, but the analogy is in other respects obvious.

As to the privilege reserved to the defendant in the agreement of the 30th September, 1847, respecting the removal of the wheat crops that might be in the ground at the end of his term, such a privilege would require to be reserved in the intended lease for years, for the tenant's protection, as a tenant at will, the law would confer the right to the emblements or growing crops, should the tenancy at will be determined before their removal.

If subsequent acts and conduct be looked to, it seems the defendant was immediately admitted into possession, a circumstance in favor of its being a demise, although by no means conclusive, especially as the term was not to commence until the 1st of April following. A lease was drawn up, pursuant to the agreement, by Priestman's solicitor, but not executed, owing to his early death, which shews that a regular lease was promptly prepared by him according to the agreement; and the applications of the defendant to the Court of Chancery shew, that his impressions were, that he entered only under an agreement for a demise, that he applied for a specific performance to the widow or devisee of Priestman, and ultimately entered into a sealed agreement with her, dated the 19th of January, 1849, respecting compensation; and on the 28th of February following, undertook, in writing, to give up possession, on certain specified terms, to the purchaser, under the decree in Chancery which saved his rights; and the deed of assignment to the plaintiff of the 17th of January, 1850, in fulfilment of the sale under the decree in Chancery of the 22nd

of April, 1848, is made subject to the said agreement for a lease to the defendant, evincing the opinion of that court, that the defendant was in under an agreement only, and not an actual demise; for in the latter event the saving must have been superfluous, and a misapprehension of the legal effect of the instrument, of the 30th September, 1847. The legal effect of this instrument, therefore, determined by its own terms, as upon its execution by Priestman, and accepted by the defendant, in connection with the entry of the latter under it and subsequent considerations, so far as applicable or admissible in its construction, appears to me to be that it is an agreement executory, and not a lease.

The next consideration is, whether the defendant, upon or after his entry, became or held as a yearly tenant, or merely as having entered into possession under an executory agreement, expecting a lease.

It is said in some cases that where parties have entered under executory agreements for leases, whether they speak of, or are silent on the subject of possession, the relation of landlord and tenant exists, the entry being with a view to a lease and not a purchase; and that if they afterwards pay rent as wholly or in part of a yearly rent (*a*), they become tenants from year to year (*b*); for the distinction between a lease and an agreement is said to be material. That by a lease, the lessee acquires an *interesse termini*; and upon entry the term is fully vested. Whereas by an agreement, he acquires no vested interest in the term and could not resist an ejectment, although in most cases it operates as a license to enter; and after the tenant has entered and paid rent, he becomes a tenant from year to year.—1 M. & R. 137; 3 B. & C. 478; R. & M., N. P. C. 355; 8 M. & W. 118; 7 Q. B. 611; 2 Taunt. 145; 4 Taunt. 128; 2 D. & R. 565; 5 Bing. 185; 5 B. & A. 322; 7 Bing. 590; 7 A. & E. 451; 9 A. & E. 644; 10 M. & W. 495; Peake, N. P. C. 192; Holt N. P. C. 47; 8 M. & W. 118; 2 M. & W. 111; 5 Tyr. 753; 2 C. M. & R. 120; 4 Tyr. 852; and 1 C. M. & R. 398.

Had the defendant paid rent after his entry, he no doubt would have come within the foregoing class of cases, upon

(a) 4 Taunt. 128.

(b) Archbold's L. & T. p. 58.

an implied yearly tenancy ; but he has not paid any rent since his entry, or done anything to constitute a yearly tenancy apart from the agreement itself, and the agreement under which he entered cannot have the effect of creating a yearly tenancy, unless by reason of the payment of the first year's rent in advance, which raises the difficulty in this point of the case. Having paid for the first year in advance, and being afterwards admitted into possession, it may be said he was entitled to enjoy for that year at all events, and could not have been dispossessed by ejectment. If so, he must have entered as, or become, a tenant from year to year certain, and as a consequence a yearly tenant, there being nothing to limit such tenancy to a single year.—7 M. & G. 987 ; 3 C. B. 229.

The word rent is not used in the agreement, although it speaks of the expiration of the term ; but no doubt the 70*l.* per annum was intended to be reserved as a yearly rent. Still I do not think the 70*l.* paid in advance is to be regarded strictly as rent ; I look upon it as a sum in gross, although a yearly rent may be reserved, payable in advance.—7 Price, 690 ; 2 T. R. 600 ; 3 T. R. 393, 678 ; 7 Taunt. 157 ; 2 Mar. 433 ; 3 B. & Ad. 899 ; 3B. & C. 478 ; 7 Q. B. 709 ; 2 Bing. N. S. 411 ; 6 M. & W. 659 ; 1 Bing. N. S. 17 ; 1 H. B. 562.

The defendant entered under an agreement for a lease, and not as a yearly tenant ; nor do I think his having continued to hold for two years, makes any difference under the circumstances. During that period, nothing occurred to convert his original entry under an executory agreement for a lease, into a yearly tenancy. The 70*l.* a year rent was only agreed to be paid in consideration of his receiving a lease for seven years, determinable in the manner expressed in the agreement ; and the circumstances do not warrant his occupation for the second year being treated as holding as a yearly tenant at 70*l.* rent. And if not, there is no certain rent, which proves the occupation to have been general under the agreement exclusively, as a subsisting executory contract during Priestman's lifetime, and after his death perhaps only as a tenant at sufferance. Had he paid any

thing after his entry, as on account of a yearly rent, it would have altered the case and established the new relation of a yearly tenancy; but he did not. The nature of the defendant's possession is tested by asking whether Priestman, or those claiming under him, could have ejected him during the first or second years, without giving him the six months' notice to quit. If my view be correct, such notice would not have been necessary; because the defendant was not possessed of any certain interest or term of years.—2 M. & W. 111.

If the agreement constituted a demise, or if the defendant was entitled to be regarded as a yearly tenant, then in my opinion, the plaintiff could not recover in the present form of action, but must have declared on the demise, as the assignee of the reversion (*a*), for rent in arrear for the year ending on the 31st of March, 1850, and the declaration might be amended accordingly; but in my view of the case, I consider the present the proper form of action, if the plaintiff is entitled to maintain any action against the defendant for the use and occupation of the premises; and consequently the question is whether debt for use and occupation lies in favour of the plaintiff under the circumstances.

The distinction between debt or assumpsit for use and occupation, and debt on the demise, is material.—2 W. R. 1173.

Had Priestman lived, and the defendant been holding as a tenant for a term of seven years, or from year to year, the rent would only have become due yearly, and payment thereof could only have been enforced after the expiry of each successive year; whereas, being only in possession under a contract for a lease, the defendant was merely a tenant at will at no fixed rent, however liable to make compensation for the enjoyment, if beneficial, as having entered with a view to a tenancy and the payment of rent; in which event, the landlord's remedy would be not an action for rent in arrears, but debt or assumpsit for use and occupation, as for a demand accruing *de die in diem*.—1 Q. B. 421; 8 A. & E. 366.

The position of Priestman, if living, and the plaintiff,

(*a*) 1 M. & G. 589.

are not identical as respects the defendant's liability to such an action.

While the contract for a lease subsists between the parties, and remains executory, and the defendant, although in possession and enjoyment, has been guilty of no default, and is willing to accept a lease pursuant to the agreement, there are cases strong to show that he is not liable to the payment of rent, or to make compensation therefor, as upon an implied promise, until a lease has been made to him under the express contract, or he has refused it. No implied contract arises where the tenant holds under an express one, which provides for the very matter.—See *Ld. Denman*, C. J., 10 Q. B. 141; *Peake*, 192; 2 Taunt. 145; 2 Taunt. 148; *Holt N. P. C.* 47; 3 B. & C. 478; *R. & M. N. P. C.* 355; 2 Star. 419; 1 C. & P. 589; 6 Price, 147; 2 B. & B. 680; 2 C. M. & R. 120; 8 M. & W. 118; 4 M. & G. 30; 7 Q. B. 611; *Law Library*, vol. 36, 497; 6 A. & E. 854; 5 East, 449.

In this respect, therefore, there may be a difference. So also when a term or yearly tenancy exists, and the demand is for by-gone rent, or rent for a period antecedent to the time the assignee acquired the title.—1 B. & B. 50; 16 East, 99; 3 M. & W. 602; 10 Q. B. 135; 13 M. & W. 12; *Finlayson's Leading Cases*, 216; 3 B. & Ad. 411; 1 Car. & M. 78.

The change of circumstances, and their effect upon the agreement between Priestman and the defendant, as respects his legal rights and responsibilities, are therefore to be considered.

Now when Priestman, on the 30th September, 1847, agreed to grant a lease to the defendant for seven years, the evidence shows that he himself had no legal term or estate of that duration. He had mortgaged or conveyed absolutely in fee to Austin, and had become a tenant for years under him, by virtue of a lease for five years, from the 28th July, 1845 (which would end on the 27th July, 1850), with a covenant on Austin's part to convey to him in fee, upon payment within the term of 300*l.*; Priestman giving six months' notice of his intention. But Priestman did not covenant or undertake to make such payment at all events,

with him it remained optional; consequently, when the defendant entered under the agreement, Priestman was lessee for years of Austin, under an unexpired term of five years, and had an equitable interest in the reversion or fee simple, by virtue of his former seizin in fee and Austin's covenant to re-convey on the terms specified; but Priestman had no legal reversion at the end of seven years from the 30th of September, 1847, or 1st of April, 1848, or at any later period than the 28th July, 1850. Until that time he had a legal interest as lessee of Austin, but in law had no right to demise or sublet to a more remote period. He had agreed therefore to grant a demise to the defendant not in his power to make, unless he afterwards paid the 300*l.* and obtained a deed in fee from Austin, which might feed the demise—15 M. & W. 229.

From the defendant's entry until Priestman's death he was tenant at will, in possession under an executory agreement for a lease for seven years, and Priestman had a legal and equitable interest as above mentioned. Had Priestman lived, he could not have distrained or sued for a yearly rent; his only remedy, if any, (that is if the existence of the special executory contract, unbroken and adhered to on the defendant's part, did not preclude it,) would have been for use and occupation; in which event the defendant, treating the agreement as rescinded or put an end to, might have set off the 70*l.* as paid upon a consideration that had failed, or a contract that had ceased.—13 Jurist, 1056.

Then, in October, 1847, Priestman devised and bequeathed to his wife all such property as he died possessed of or anywise entitled to, real and personal, to hold to her, her heirs, executors and assigns, and appointed her and another person executrix and executor. He soon after died, and both of them administered.

The effect of each devise I suppose, was to transfer to his widow whatever equitable right he had to the fee simple, or to redeem it and become entitled to a reconveyance, and to make her the specific legatee of the residue of the term for five years, granted by Austin, subject to the assent of the executors.—3 M. & S. 382; Co. Lit. 151, secs. 221, 229;

Cro. El. 328, 637 ; 1 Sand. 237 ; Doug. 184 ; 7 A. & E. 451. Which assent she herself as executrix might give.—2 Williams on Executors, 849.

Prima facie the unexpired term would belong to the executors as such ; and I do not perceive any assent on their point, either jointly or separately, to the widow's taking it as legatee (a), beyond her implied assent by assigning her whole interest to the plaintiff under the decree in Chancery, and which I should, in absence of any objection on that head, or authority to the contrary, take to be sufficient to pass the same to the plaintiff.

The effect of Priestman's death, however, was to determine the tenancy at will subsisting between him and the defendant.—1 U. C. R. 35, 310 ; 1 C. M. & R. 549 ; 2 U. C. R. 153 ; 5 U. C. R. 453 ; Co. Lit. 92, 55, 57 ; Lev. 202 ; Comyn's Digest, Trespass, b. 2 ; Roscoe on Real Actions, 662 ; 5 Co. 116 ; 2 M. & W. 112 ; Archbold's Landlord and Tenant, 78, 215. And the defendant continuing in possession was in no better position than a tenant at sufferance.—7 M. & W. 226 ; 9 M. & W. 643 ; Viner's Ab. Estate, Tenant at Sufferance D. (c). And admitting the subsequent negotiations between him and Mrs. Priestman, respecting his claim against Priestman's estate, and the surrender of the possession, aided by the recitals and reservations contained in her assignment to the plaintiff, placed him in a new relation, I do not think it did more than constitute him a tenant at will to her, as he had been to Priestman. He evidently applied to her as representing Priestman's estate, which he held responsible, although the overtures and arrangements—which must be borne in mind—appear to have proceeded on the assumption that the agreement for a lease still subsisted or was revived.

In this state of things, Mrs. Priestman, on the 17th of January, 1850, executed the assignment to the plaintiff, reserving therein Austin's and the defendant's rights, and reciting that the latter was in possession of the premises, under an agreement for a lease thereof to him at the yearly rent or sum of 70*l*.

(a) 7 Taunt. 223.

The term of five years under Austin not being then expired, the effect was to transfer to the plaintiff a legal interest in the residue thereof as assignee, and the equitable interest already mentioned. Then, does an agreement for a lease to the defendant for seven years from the 1st of April, 1848, subsist between the plaintiff and the defendant? If it does, the cases already cited seem to shew that the present action should fail, being prematurely brought while such agreement continues open and executory, and the defendant willing to abide by it, and in no default. But I do not think any such agreement can be recognized in law, whatever equitable rights may have accrued or exist under the recital and reservations in Mrs. Priestman's assignment and the other circumstances.

The agreement was signed by Priestman only, and is not under seal, and I apprehend was not a contract running with the land or term, or binding on the devisee or legatee of Priestman—that is at law. If set up again by Mrs. Priestman, so as to have been impliedly revived between her and the defendant, I do not think it passed as legally obligatory on the plaintiff, without further recognition than appears.

The transactions that took place between Mrs. Priestman and the defendant, and his applications to the Court of Chancery, import that the purchaser under the decree was to have possession—in other words, that the agreement for a lease to the defendant was to be at an end. Although the assignment reserves the defendant's rights, the recital does not state the sale to have been on the terms of any such reservation—it mentions only the lease from Austin. The plaintiff has not executed the assignment, and his adoption of its contents is no further evinced than by his bringing this action as assignee under it; in which, however, he treats the defendant as liable to make compensation for the enjoyment of the premises, in a form incompatible with the existence of an agreement binding on him to grant a lease to the defendant before he can be legally called upon to pay rent, or without a tender and refusal being shewn. Further, the defendant is no party to the

assignment to the plaintiff, nor is he barred thereby; and nothing is shewn to have occurred between him and the plaintiff since the latter became the assignee, to revive the old or to make any new agreement for a lease for years.

So far as presumptions go, it cannot be presumed the plaintiff undertook to do, what as assignee he acquired no sufficient title that would enable him to do, and which (being technically impossible) a court of equity would not, for it could not, compel him to perform, that is, to grant a lease for seven years, ending the 1st of April, 1855, while he himself possessed only the residue of a term for five years, ending in July, 1850.

I cannot hold therefore that the defendant continues in possession under a subsisting agreement for a lease legally binding on the plaintiff; and in whatever relation he may stand towards the plaintiff in the eye of a court of equity, as entitled to enforce a specific performance of Priestman's agreement for a lease for seven years, or to compel him to redeem the estate in fee by paying Austin 300*l.*, without which he could not grant so long a term, I do not consider him entitled at law to be regarded as more than a tenant at will or at sufferance.—4 M. & G. 30; 5 B. & C. 433; 4 Tyr. 852; 2 M. & R. 303.

At the same time I do not think the defendant was a trespasser against whom the plaintiff could have maintained an action of trespass *quære clausum fregit*, although he might have brought ejectment, without any previous notice to quit or demand of possession. The plaintiff became legally entitled to the unexpired term granted by Austin, on the 17th of January, 1850, and the defendant continued to hold and enjoy until the 4th of April, 1850, when this action was brought: and it seems reduced to the question, whether the legal assignee of the legatee and executrix of a lessee of a term for years unexpired, can recover in debt for use and occupation against a person who entered under the original lessee, under a contract in writing signed only by such lessee, for a lease to exceed in point of time the duration of his own term.

If the plaintiff could have ejected the defendant, it seems

to be considered that under circumstances like the present, he may waive that remedy and sue for use and occupation ; on the ground of an implied permission to the defendant to occupy, evinced by his forbearance to treat him as a trespasser in an ejectionment, and subsequent election to treat him as having enjoyed with his assent. If the plaintiff could have ejected him, the occupation suffered by him is looked upon as permissive, and, if permissive, the action lies ; but of course only for a period during which the legal title was in the plaintiff (a). And it appears to me the plaintiff might have ejected the defendant, had he been so disposed. This test of course applies to cases like the present in their circumstances as respects privity, and not to those adverse entries or tortious possessions, when nothing exists to create any privity, or to establish the relation of landlord and tenant between the parties, so far as that relation is essential to an action for use and occupation.—3 M. & S. 382 ; 16 East, 99 ; 1 Bing. 147 ; 3 M. & W. 602 ; 2 Can. 13 ; 7 A. & E. 451 ; 1 B. B. 50 ; 10 Q. B. 135 ; 9 D. & K. 480 ; 8 C. & P. 389 ; 9 C. & P. 6 ; 5 C. & P. 42 ; Finlayson's Leading Cases, notes, pp. 166 to 202, 214, 216, 220, 221 to 222.

It appears to me, therefore, that as between these parties the agreement for a lease cannot be considered as legally existing, so as to bind the plaintiff at law by adoption or otherwise, that in the absence thereof the defendant held over, under circumstances rendering him liable to the plaintiff for use and occupation ; but from the time only that the plaintiff became legally entitled—that is, the 17th January, 1850. I mean entitled to the legal interest, as distinguished from an equitable interest. Consequently that the plaintiff is entitled to recover in this action from that day to the 4th of April following ; and 70*l.* a year having been adopted as the rate of compensation, and which, according to the data afforded by the evidence, was not an unreasonable amount, it follows that the present verdict is correct in point of amount, unless as respects the four days between the 1st and 4th of April, a matter of no moment.

(a) 2 M. & R. 303.

Consequently neither rule can be made absolute, and both should be discharged.

Whatever, if any, ulterior remedy for breach of the agreement, the defendant may still have against Priestman's estate, notwithstanding his arrangement with Mrs. Priestman and his applications to and partial compensations in the Court of Chancery, I do not think the legal rights of the plaintiff, as assignee, involved therein or affected thereby.

Debt for use and occupation.

Plea—*Nunquam indebitatus*.

To prove that the defendant held the premises under the late Matthew Priestman, certain claims preferred by the defendant in the Court of Chancery, for damages for the non-fulfilment of an agreement by Priestman to put up certain buildings, &c., on the premises in question during the defendant's tenancy, were put in ; and it was admitted by defendant's counsel that he had received 60*l*. from the estate of Priestman for the damages arising from the non-fulfilment of the agreement for two years, up to the 1st of April, 1850. It was proved or admitted that Matthew Priestman died soon after entering into the agreement with Young, leaving a will duly executed, by which he devised to his widow, Martha Priestman, all his interest in the premises in question.

A deed, bearing date the 17th January, 1850, executed by Martha Priestman to the defendant, was then put in, by which it appears that certain creditors of Matthew Priestman had applied to the Court of Chancery for relief, in obtaining payment of certain debts ; that the Court of Chancery, for the purpose of affording such relief, had ordered the premises (lot No 32, 2nd concession of Etobicoke), or rather the interest therein of Matthew Priestman or his devisee, to be sold ; that the same had been sold ; and that the plaintiff, as the highest bidder, had become the purchaser thereof, for the sum of 240*l*. This deed, executed in pursuance of the decree of the Court of Chancery, conveys all the estate and interest of the late Matthew Priestman, and of Martha Priestman as devisee, in the said lot, to the plaintiff, *subject to the agreement for lease to the defendant*.

The plaintiff, being the purchaser of the premises, and holding them on the 1st of April, 1850, when the year's rent from the 1st of April, 1849, became due, and holding the premises subject to the term of the defendant by the express terms of the deed from Martha Priestman, claims the year's rent of 70*l.* to be paid by the defendant, according to the agreement with Priestman, which was put in and read, bearing date, 30th September, 1847; by which it was stipulated that defendant should have a lease for seven years, commencing 1st of April, 1848, at 70*l.* per annum—the first year's rent being paid in advance by defendant, and the second on the 1st of April, 1850.

It was objected by the defendant that plaintiff should have sued in trespass or ejectment; that there was no proof of the relation of landlord and tenant; and if no term was created, then, as defendant was not in with plaintiff's permission, he cannot be made to pay for use and occupation. The Chief Justice of Upper Canada was under the impression at the trial, that plaintiff, in *this form of action*, could only recover for the period that he held the title—that is, from the 17th of January, to the 1st of April, 1850.

A verdict was given for plaintiff, and 17*l.* 10*s.* damages, with leave to move to enter a verdict for the whole year's rent up to the 1st of April, 1850, if the court is of opinion that in this action, plaintiff can recover for a period before his interest accrued.

The counsel for plaintiff, pursuant to leave reserved, moved that the damages be increased to 70*l.*; and the counsel for defendant moved to set aside the verdict, and that a new trial be had, on the grounds that the verdict was contrary to law and evidence, and for misdirection, or why the verdict should not be entered for the defendant, or why not set aside and a non-suit entered, or why the verdict should not be reduced to the amount which would have accrued from the date of the deed to the issuing of the summons in this cause—(summons issued 4th of April, 1850, as appears by the record).

If this were an action of debt for *rent* reserved in the agreement of defendant with Priestman, it might become

necessary to enquire whether that agreement amounts to and operates in fact as a lease, or whether it is merely to be regarded as an agreement for a lease, to be executed at a future period, on certain terms therein mentioned. If it could be regarded as an actual lease, then the plaintiff would be entitled, as the assignee of the premises, to any rent accruing for the year during which he became the landlord of the defendant; but if only as an agreement for a lease, containing no obligation to pay rent to the lessor or his assigns, the plaintiff would only be entitled to recover for the use and occupation of the premises by the defendant after his title accrued. The action is brought for such use and occupation, and the declaration expressly alleges that the premises have been held and enjoyed by the defendant by the license and permission of the plaintiff. Now, such license and permission could not extend to a period before the plaintiff became the owner. The defendant, up to the time of plaintiff's title accruing, must have held under the prior owner; and if in fact he entered only under an agreement for a lease, and not under a valid lease, the representatives of Priestman would be entitled to claim for the use and occupation of the premises while they belonged to them. The verdict is for the use and occupation after the plaintiff became the assignee of the premises, and the amount appears to have been governed by the original terms between Priestman and the defendant. Had the jury given more than a fair proportion of the sum agreed upon, for the use of the premises between the period of plaintiff becoming the owner and the commencement of the action, their verdict could not properly be set aside on that account.

I do not see, therefore, that the verdict can be reduced or increased, under the circumstances of this case. The defendant, having entered under the agreement for the lease, and enjoyed the premises under it, could not be treated by the plaintiff as a trespasser. Being in possession when plaintiff's title accrued, and his continuing in possession being acquiesced in by plaintiff, there is an implied use and occupation of the premises by plaintiff's permission, and the defendant had no right to object to pay for such use and occupation, whatever it may be worth. There is

no sufficient ground established, as it appears to me, to interfere with the verdict. I think, therefore, that the rule of the plaintiff to increase the amount of the verdict, and the rule obtained by the defendant to set aside the verdict or to reduce the amount, must be discharged.

SULLIVAN J.—The result of this case will depend upon the answers which can be given to the following questions: Is the instrument produced at the trial, signed by Matthew Priestman, a lease or an agreement for a lease only? And if the latter, are there any circumstances in evidence, which would make the holding of the premises by the defendant a tenancy from year to year?

This action, for use and occupation, is brought for the purpose of recovering a whole year's rent: the plaintiff's title not being co-extensive with the period for which the demand is made, but arising after the commencement of the year. If the defendant were a tenant for a term of years, at a rent payable yearly—or if he were a tenant from year to year, at a yearly rent—then the plaintiff's right to a whole year's rent would be plain; but I think in that case it is equally clear that it could not be recovered in this form of action, which is founded on a permissive occupation—an occupation which commenced before the plaintiff's title accrued; if continued after that time, by virtue of a demise granted before, it cannot in any sense be considered an occupation by permission of the plaintiff for the whole year, during a portion of which the plaintiff had no title; and if the rent were payable yearly, and if by the effect of an assignment of the reversion, it became vested in the plaintiff, it would be his as rent, in one indivisible demand for the whole year; it might be recovered by distress, or in an action of debt for rent, but not upon a *quantum valebat* for use and occupation. Then, if the whole could not be recovered in this form of action, neither can a part, for the rights of parties cannot be changed by the mere form of action. A recovery of a portion of the year's rent in an action for use and occupation, would be no bar to an action of debt for the whole year's rent; it could not defeat such an action in the whole without posi-

tive injustice ; and if part of the demand were allowed to be recovered in one form of action, and part in another, a multiplicity of suits for the same demand would be permitted, as the consequence of the plaintiff selecting the inappropriate remedy.

It is true that under the statute 11 Geo. II. c. 19, sec. 14, an action of assumpsit for use and occupation may be maintained, notwithstanding an actual parol demise, and the demise may be used as evidence of the *quantum* of damages to be recovered ; but the rule thus established, which enables a landlord to recover in this form of action notwithstanding a demise, gives him no right which he would not have had if there had been no such demise.

The assignee of a reversion may therefore recover for rent, the whole of which accrued in his time ; that is to say, for periods which commenced and ended after the assignment—for he could recover if there were no demise, and the occupation not adverse ; but for a year which commenced before his title accrued, he could not recover if there were no demise ; in that case he might recover on a *quantum valebat*, for occupation *de die in diem*. There being, however, a demise with a yearly rent reserved, this could not be allowed without imposing obligations, inconsistent with the demise, upon the tenant, which certainly the statute never intended : the right of the landlord is to a whole year's rent, and unless he could recover the whole in an action for use and occupation, if there were no demise, he cannot recover it under the statute if there be a demise ; and as he has no right to divide his demand, contrary to the reservation in the demise, his adoption of this form of action cannot give him such a right.

It follows then, that if in this case there be a tenancy for a term of years, or from year to year, with a rent accruing yearly, the plaintiff cannot in this form of action recover in the whole or in part.

But if, on the contrary, the instrument in question be a mere agreement, and if there be nothing in the circumstances proved, to establish a yearly tenancy, then up to the time the plaintiff's title accrued, Priestman would be entitled

to recover for the use and occupation of the premises, and thenceforth the plaintiff would be entitled in the same manner.

On the argument of this case, I was inclined to think that the agreement containing the whole of the terms of the intended tenancy, and shewing a year's rent paid in advance, coupled with the fact of the defendant's having gone into immediate possession, and continuing in possession during the year for which such rent was paid, and afterwards; and considering the further fact of his having claimed and recovered damages in the Court of Chancery, for non-fulfilment of the improvement clauses by Priestman, it struck me that all these would shew a demise; but after a careful perusal of all the authorities, conflicting as they are in many respects, I do not find any to sustain this opinion.

In the construction for agreements for leases, the courts, as in the construction of wills and testaments, have from very early times, endeavoured to disregard technicalities, and to arrive at the intention of the parties; the consequence in both cases has been to introduce infinite difficulty and perplexity into the law—to make the rights of property uncertain, and as there must of necessity be some limits even to the attempted liberality of construction, to introduce upon the verge of that liberality, rules as arbitrary and contradictory to common sense and understanding, as any belonging to the laws of property, that have descended to us, in all their strictness, even where the original foundations of them are lost in the obscurities of age. The distinction, which belongs to our law exclusively, between written instruments under seal, called deeds, and writings merely signed, is perhaps as arbitrary and indefensible upon any principles of abstract reasoning, as can well be imagined. And yet, at a time when legal technicalities are almost universally discountenanced, and are daily vanishing before the attempts of legislatures and courts to make laws accessible to common understandings, and through the medium of common language, we find the parliament of England, by the statute of 7 & 8 Victoria, ch.

76, and 8 & 9 Vic. ch. 106, invalidating all leases in writing, not under seal, in which our legislature has followed in the statute 12 Vic. ch. 71, sec. 4, unfortunately copying the former instead of the latter British act: thus we find, that for the purpose of avoiding the uncertainty and perplexity arising from construction of language according to common intent, and with a view to the presumed intention of parties, refuge has been taken under the arbitrary distinction of seal, or no seal, which for the future will prevail against all intention, however plainly expressed.

This statute has not a retrospective effect, and it is necessary to ascertain upon the law as it stood when the instrument in question was made, whether it is a lease or a mere agreement.

There are multitudes of cases where instruments apparently or professedly only agreements to demise, have been held to be leases. The first quality which they must possess for this purpose, is that they have words of present demise.

Thus in Mulden's case (*a*), the words "you shall have a lease of my lands, paying therefor ten shillings per acre; make a lease in writing, and I will sign it," were held to be a good lease by parol. This case is scarcely distinguishable from the present, which is, "I agree to sign a lease," &c. The distinction, however, is this: the undertaking to give the lease shewed the intention of demising, and it was not necessary in Mulden's case that there should be a written lease. The estate, therefore, passed by the words; the written lease promised was a further assurance. In the present case, all is made to depend upon the signing the lease. So in Harrington v. Wyer (*b*); Tisdale v. Essex (*c*), and in Bayton v. Brown (*d*), the words were—"They agreed with all convenient speed to grant a lease to the said Browne, and they did thereby set and let to him," &c. This was held to be a lease, because of the words of present demise, and also because of the lessee having occupied under the agreement. The latter reason is not unfrequently

(*a*) Cro. El. 33. (*b*) Cro. Car. 207; (*c*) Hob. 34. (*d*) 2 Blackstone, 937.

given for a like decision in other cases, but never alone; and according to late cases which I shall remark upon, it is not a good reason at all; for the intention of the parties to a written instrument cannot, it is said, be explained by their after conduct. In *Goodtitle v. Eastwich* (a) there are words of present demise—"A. B. agrees to let, and C. D. agrees to take, and that leases shall be executed by Michaelmas next," was held not to be a present demise; but in this case and *Doe Coone v. Clan* (b), the reason given is, that as leases they would be void, having no stamp. Lord Kenyon's decision at nisi prius was overruled for this reason in the latter case, and the reason would not at the present day, be considered a sound one.

In *Roe Jackson v. Ashburner* (c), the words "he shall enjoy and I engage to give him a lease for the term of thirty-one years from Whitsuntide," were held not to be a present demise, but to impart an intention in *feri*, because the parties agreed, the one to give and the other to receive a future lease; but this, in accordance with other cases, would not prevent the *interesse termini* passing. The instrument was, for other reasons, not a lease; part of the ground was yet to be purchased, without which there was to be no lease. This was sufficient reason for the decision. Ashurst, J., founds his opinion partly on the fact that the tenant was not let into possession, for the permitting the party to enter, is strong evidence to shew that the landlord intended to give a present demise. If this latter reason were good, it would apply to the present case; but according to later decisions, the letting into possession is not a guide in the construction of the written agreement. In *Poole v. Bentley* (d), the words "hereby agrees to let, and the said Bentley agrees to take, for sixty-one years from Lady-day next, the first quarter's rent within fifteen days after Michaelmas, and in consideration of a lease to be granted, Bentley agrees within four years to lay out 2000*l.*"—this was held to be a present demise, Lord Ellenborough saying, "the rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the

(a) 1 T. R. 735. (b) 3 T. R. 739. (c) 5 T. R. 165. (d) 12 E. 168.

instrument must govern the construction ; here, the intention appears to have been that the tenant, who was to expend so much within four years, should have a present legal interest." This ground of Lord Ellenborough's judgment would apply to the present case, for the intention would surely appear to have been, that the defendant, who paid rent in advance as rent, was to have a present legal interest ; but still the words of present demise are wanting. There is no agreement to let, but there is to sign a lease ; and however worthless the distinction may appear as explanatory of intention, yet in no case do I find the agreement to *sign* or to execute a lease held a demise.

In *Doe Walker v. Groves* (a), the landlord agreed to let, and upon demand to execute a lease—the agreement to be binding till the lease executed. This was held a demise. In *Morgan ex dem. Dowding v. Bissell*, Chief Justice Mansfield said, "Where the party enters into that which on the face of it, appears to be an agreement, though there are words of present demise, yet if you collect from the face of the instrument, the intent of the parties to give a future lease, it shall be an agreement only." The case is decided rightly, because of uncertainty in the rent, which made the instrument only an agreement ; but the doctrine attributed to Lord Mansfield, cannot be law to the extent which the words of the report would involve. In *Stamforth v. Fox* (b), the payment of 4*l.* in earnest is considered important as shewing a present demise ; but the words of the agreement were "agree to let." In *Pemero v. Judson* (c), the agreement was, not to let, but, as in the present case, to grant a lease ; but the words in the cited case were added—"and in the meantime, and until such lease shall be executed, to pay unto the said J. P. the aforesaid yearly rent, and to hold the same premises, subject to the covenants aforesaid : " the case turns upon the added words. In *Doe Pearson v. Reis* (d), there were words of present demise and possession ; upon which latter fact Tindall, C. J., a good deal founds his judgment ; the rent commencing at once. Bosanquet, J., says, in giving judgment in this case—

(a) 15 E. 126. (b) 7 Bing. 590. (c) 6 Bing. 206. (d) 8 Bing. 178.

"However desirable it may be to find some certain criterion for ascertaining the intention of parties upon such occasions, the difference between instruments is so great that none has yet been discovered." In *Wilkinson v. Hall* (*a*), as reported in Scott, Tindal, C. J., again partly founds his judgment upon the possession. But in *Alderman v. Neate* (*b*), Lord Abinger, remarking upon the words of Tindal, C. J., in the case of *Wilkinson v. Hall*, says—"can it be said that the legal intention of the instrument is to be ascertained by the subsequent conduct of the parties?" The judgment of Vaughan, J., in *Wilkinson v. Hall*, is important to shew that in actions for use and occupation it is indispensable to prove occupation by permission of the plaintiff. In *Dunk v. Hunter* (*c*), the words "agrees to let on lease," were held to be only equivalent to the words "execute a lease," and therefore not to be words of present demise.

Alderman v. Neate (*d*) shews clearly what are the leading distinctions which constitute agreements merely, and demises—that is to say words of present demise; certainty as to the commencement of the term and as to the end, and certainty as to the rent, are all necessary to make a lease. An agreement to execute a lease does not prevent the instrument containing an agreement to let, from being a present demise, but the agreement to execute a lease is not in itself a demise. Lord Abinger's judgment in this case also shews that the intention of the parties must be gathered from the writing itself, and not from subsequent conduct. *Beeknell v. Hood* (*e*) was an agreement to grant a lease; and until the execution of the lease, the landlord was to have a right to distrain. This caused much doubt to the court at first, as the right to distrain seemed to contemplate a tenancy independently of, and antecedent to the lease; but there was nothing binding on the landlord to give possession prior to the lease, and the court supposed the agreement for the right of distress, to contemplate a mere probability; it therefore conveyed no *interesse termini*, and was a mere agreement. *Naish v. Jalloek* (*f*) is a like authority. It

(*a*) 3 Bing N. C. 508; 4 Scott, 381. (*b*) 4 M. & W. 785. (*c*) 5 B. & Al 322.
 (*d*) 4 M. & W. 704. (*e*) 5 M. & W. 104. (*f*) 6 M. & W. 104.

was there held that an instrument was an agreement only for the amount of rent,—the periods of payment, and other terms of holding, are not mentioned, except as they are to be contained in a lease which is to be prepared;” “and the instrument does not, as in many of the cases, import that it shall be binding until a lease is actually executed.” *Brashier v. Jackson* (*a*), is a like authority, and meets the present case in a very important point.—The agreement was held not to be a demise, because it was to execute a lease, and this notwithstanding that the possession was to be entered on immediately, and notwithstanding also that a payment of 25*l.* was to be made on the date of the agreement.—See also *Gouldsworth v. Knights*, 11 M. & W. 337.

Hayward v. Pritchard (*b*), and *Rawson v. Eicke* (*c*), are consistent with the later authorities on the same point. In *Doe Phillip v. Benjamin* (*d*), the instrument contained words of present demise, “agrees to let;” it was held a lease, though the consequence was that the accruing rent on a previous holding by the same tenant, was by this construction lost to the landlord. In this case it is clearly laid down that acts of the parties or other collateral matters, do not help the construction of the contract.

It seems to me from the perusal of these authorities, that I am bound to hold the present instrument a mere agreement to let, not a lease; that the holding under it might have been put an end to at any time by a demand of possession and an ejectment; that the defendant had no estate in the premises by virtue of the agreement, but as a tenant at will in contemplation of a lease, which was never executed.

The next point is, whether the circumstances subsequent to the execution of the agreement, or the payment of the year’s rent in advance, shew a tenancy from year to year.

Lord Bolton v. Tomlin (*e*), establishes clearly, that if there be an agreement for a lease, even though not signed according to the Statute of Frauds, yet occupation and subsequent payment of rent under it, constitute the tenant a tenant from year to year. See also *Den v. Cartwright* (*f*).

(*a*) 6 M. & W. 549. (*b*) 6 Ad. & El. 265. (*c*) 7 Ad & El. 451.

(*d*) 9 Ad. & El. 644. (*e*) 5 Ad. C. & Fl. 856. (*f*) 4 E. 29.

Atherstone v. Bostock (*a*) recognizes the same doctrine; also *Knight v. Bennett* (*b*); *Doe v. Smith* (*c*); and in *Cox v. Bent* (*d*), when no rent was paid, but merely an account rendered to the tenant, which he objected to, in part, and which was amended accordingly, that fact was held to shew a tenancy from year to year.

In *Doe Anglesey v. Roe* (*e*) there was an agreement for a demise for eight years, at 2*s.* 6*d.* per year, the tenant agreeing to pay 40*s.* for every day he should hold over. There was no lease granted, but the tenant held during the contemplated term, and afterwards he held over. He was held then not to be a tenant from year to year. *Doe v. Pullen* (*f*) is the case of a tenant let into possession and not paying. *Doe v. Cartwright* (*g*) is a like case, and the facts were held not to establish tenancies from year to year.

In *The Mayor of Thetford v. Tyler* (*h*) A. enters before the expiration of a lease to B., and in B.'s place, till the end of his term, and under an agreement for a new lease, which is never executed. It was held in an action for use and occupation, that he was not in under the terms of the expired lease—neither at the new rent of the agreement, but that it was for the jury to express the value.

I find no case to warrant an opinion, that the payment in advance in contemplation of a lease, would in itself render the holding, a tenancy from year to year. The fact does not shew the intention of the parties that there should be a tenancy from year to year, in the possible event of no lease being executed. The payment of rent subsequently—no lease being executed—would shew a subsequent intention binding on the parties, though no lease executed. There is nothing in mere occupation to shew subsequent arrangement of this kind.

Does the subsequent fact of the tenant's claiming from the estate of Priestman, damages for non-fulfilment of stipulations—not made, but stipulated to be made—in the lease, alter the relation between the landlord and tenant, and shew that the latter was a tenant from year to year?

(*a*) 2 M. & G. 511. (*b*) 3 Bing. 361. (*c*) 1 M. & R. 137. (*d*) 5 Bing. 185.
 (*e*) 2 D. & R. 565. (*f*) 2 Bing. sec. 10, 749. (*g*) 3 B. & A. 326. (*h*) 8 Q. B. 95.

The claim made by the defendant on the Court of Chancery, was not for damages for non-execution of the lease; he did not seek specific performance; his claim was not consistent with his being in mere permissive occupation, with a *quantum valebat* rent, accruing *de die in diem*; for in that case his rent would have been merely so much the less, because of the want of the contemplated ameliorations. He was not allowed a deduction of rent, but damages as having paid rent, and as having been entitled to have improvements made. This looks like a tenancy for the whole term, or at least like a yearly tenancy; and if he were tenant by the year for the first year, so he would be as long as he continued to hold. But I cannot look upon the defendant in this case, as having at any time an estate beyond a tenancy at will: I cannot see that the agreement to sign a lease, with stipulations to make certain improvements, followed the reversion; or that the assignee of Mrs. Priestman, or Mrs. Priestman herself, was in any way bound to make the improvements. Then I cannot assent to the absurdity, that the tenant, by mere reason of his occupancy, shall be bound to pay the same rent for an unimproved farm, which he was to pay in taking a lease for one which was to be improved—and this would follow a decision which would make him a tenant from year to year. Therefore, I do not see any thing in the circumstances of this case to make the defendant a yearly tenant; and if he be less than a yearly tenant, he is bound to pay for his occupancy according to value from day to day; and the plaintiff is entitled to claim no more from him, than the value of the premises from the time that he became proprietor of the reversion; and for that time he is entitled to claim in this action for use and occupation.

If I were to hold the plaintiff entitled to a whole year's rent, I should have to decide that he is not in a condition to recover in this action. The authorities to which I would refer on this point are—*Turner v. Allday*, Tyr. & G. 819; *Packer v. Gibbins*, 1 Q. B. 421 (see the judgment of Patterson, J.); *Gibson v. Kirk*, 1 Q. B. 850; *Lovelock v. Hunklin*, 8 Q. B. 371; *Wharton v. Walton*, 7 Q. B. 474; *Cobbett v. Curling*, 10 Q. B. 785.

I think that the plaintiff is entitled to hold his verdict, and therefore that the defendant's rule must be discharged; but I do not think the plaintiff entitled to have the verdict increased to the amount of a year's rent, and therefore that his rule to shew cause why the verdict should not be increased, must also be discharged.

LYNETT V. PARKINSON.

In Replevin.

Defendant well avows the taking, &c.; because he says that before and at said time when, &c., plaintiff held said premises as tenant thereof to defendant, under a demise theretofore made by one L. to one K., for five years, at the yearly rent of 4*l.* 10*s.*; and that, plaintiff being assignee of all the term of K., defendant, before any rent became due, and after demise to K., became assignee of all the estate, right and title of L. in or to said premises; and because 13*l.* of rent aforesaid, for three years of term aforesaid, was due, defendant, at said time when, &c., seized, &c.

To this avowry plaintiff pleads that said L. when he assigned to defendant, had not, nor had defendant, at any time any reversionary interest in said premises. Demurrer to this plea: cause assigned, that plaintiff does not shew how or when the reversionary interest of L. had ceased, or in whom such reversion was vested.

Held per Cur.—First, that the avowry, if specially demurred to, could not be sustained, because it did not set out defendant's title; secondly, that the plea was insufficient, for the cause assigned.

Replevin declaration, 12th June, 1849, in District Court; removed by *certiorari*.

Declaration states that defendant, on the 22nd February, 1849, at Vaughan, in a close called lot No. 29, in the 3rd concession of Vaughan, took the cattle of plaintiff, &c.

3rd avowry.—Defendant in his own right well avows the taking, &c., the said cattle in and upon parcel—to wit, ninety acres of the south half of lot No. 29, in the 3rd concession of Vaughan, being the place in which, &c.—because plaintiff, for three years and more next before and ending on the 31st of December, 1848, held and enjoyed the said land and premises, in which, &c., (being the said ninety acres, with the appurtenances, as tenant thereof to the defendant, under a certain demise thereof in writing, before then made by one Francis Leys to one John Keyworth, for five years from the first day of January, 1844, at a yearly rent of 4*l.* 10*s.*, the plaintiff being the assignee of all the estate and interest of the said John Keyworth in the said lands and premises, with the appurtenances.

And the defendant (before any of the rent after mentioned

became due, and after the making of the said demise by the said Francis Leys to the said John Keyworth, and during all the said three years and more) being the assignee of all the estate and interest of the said Francis Leys in the said lands and premises, with the appurtenances, in which, &c., being the ninety acres aforesaid, from the 1st of January, 1846, until and at the said time when, &c.; and because 13*l.* 10*s.* of the rent aforesaid—i. e. for three years ending on the 31st December, 1848, at the said time when, &c.—was due, and in arrear and unpaid to defendant, defendant well avows taking the said cattle, &c., in the said place, in which, &c., at the said time when, &c., being within six calendar months after the said 31st December, 1848, and during the continuance of the said title of the said defendant, and during the possession of the said plaintiff, for and in the name of a distress for the rent so due in arrear and unpaid as aforesaid, and which remains due, &c.

5th plea.—To 3rd avowry, plaintiff says defendant ought not to avow, &c.; because the said Francis Leys, in said avowry mentioned, had not at the time when he assigned all his estate and interest in the said ninety acres therein mentioned, nor had defendant at the said time when, &c., or at any time, any reversionary estate, term or interest of or in the premises, with the appurtenances, in which, &c., or any part thereof, expectant upon or to take effect upon or at any time after the expiration of the term granted to said John Keyworth by the said demise—concluding with a verification.

Demurrer—special cause assigned.

1st. That defendant attempts to shew and put in issue that neither Leys nor defendant had any reversionary estate or interest in the premises, as alleged, without shewing that the estate of Leys had, before the assignment thereof had expired or been transferred or conveyed by him to any other person, or what had become thereof, or that the estate or interest of defendant had expired or been conveyed or transferred by him to any other person or persons, or what had become thereof.

2ndly. That the said fifth plea is an attempt by a tenant to put in issue the title of his landlord, under whom he holds, to the premises so held by him as such tenant.

The plaintiff joins in demurrer.

It was contended by the plaintiff's counsel, in support of the demurrer, that the plea was an implied denial of Ley's right to demise; and that had issue been taken upon it, it would have been supported by proof that he had no title at the time of the demise to Keyworth.—7 T. R. 597; 7 T. R. 537.

That the defendant should have shewn how his title had ceased, or his reversionary interest been determined—the plea impliedly admitting a reversionary interest at the time of the demise, and alleging that no such interest existed at the time Leys assigned to the defendant, without shewing how it had ended or been disposed of, or how it was that the defendant had no reversionary interest at the time when, &c.

Doe Bullen v. Mills, 2 A. & E. 17; Rogers v. Pitcher, 6 Taunt. 202; and 2 Mar. 541, were referred to by the plaintiff's counsel, who relied on Pascoe v. Pascoe, 3 Bing. N. S. 898, as justifying and supporting the plea; and also referred to Holt, N. P. C. 489, Parry v. House, and notes, and contended that the plaintiff need not shew how the reversionary interest of Leys had ceased, it being sufficient to deny such an interest in the defendant at the time when, &c.

MACAULAY, C. J.—It is proper to notice some elementary principles or general rules in relation to landlord and tenant, as applicable to this case. Distress for rent is a summary remedy for rent in arrear, allowed to the landlord or the assignee of the reversion during the term or within six months after its expiration, if the title of the landlord and the possession of the tenant continued (a); but to enable a landlord to distrain, or to confer a right to distrain, upon his assignee, he must have a reversion to which the rent is incident.—2 Dow. & Clark, 180; Pluck v. Diggs, 5 Bing. 24; Peece v. Corry, 2 M. & P. 57; 2 Wil. 375; Archbold's Landlord and Tenant, 109; 3 Bing. N. S. 898.

(a) Stat. 8 Anne, ch. 14, sec. 7.

A reversion is described to be an estate, to take effect in possession after another estate is determined—not as a future interest, but a present interest, to take effect in possession after another estate. A present fixed right of future enjoyment (Preston on Estates, 89; Co Lit. 142; Plow. 151; 1 Saund. 251; 2 Cruise Digest, 440,) for the residue of the estate, always doth continue in him that made the particular estate.—Co. Lit. 22.

Upon a lease for years the tenant until entry has but an *interesse termini*—an interest, but not an estate.—Co. Lit. 466; Plow. 422. The possession continues in the landlord with leave to the tenant to enter when the term begins, and upon entry he becomes tenant, and he is possessed of the term.—Co. Lit. sec. 58, p. 43, 47; 1 Saund. 251; Ba. Ab. Leases. 5 B. & C. 118; 1 Cruise Digest, 120; Archbold's Landlord and Tenant, 41, 58; 8 Bing. 92; Miller v. Green, 2 C. & J. 142 S. C. And there is not properly any reversion until such entry; so that before possession there is no reversion, and entry makes the possession and reversion.—Plow. 423; Co. Lit. S. 459; 5 N. & C. 118; 7 D. & R. 487; 8 Bing. 92. As to the liability of an assignee without entry, see Williams v. Bosanquet, 1 B. & B. 238. There can be no assignment of a reversion, by the name of a reversion, till the tenant enters—Co Lit. 66; 5 Co. 124; Cro. Ja. 60; Cro. Car. 110—although the estate of the landlord may of course be transferred under another description.

The mode by which a term for years is created—whether by deed indented or by deed poll, or by writing, or by parol—is often material in the application of the doctrine of estoppel, by deed, before entry, or *in pais* after entry.—Ba. Ab. Leases, 6; 1 Ld. Ray. 746; Webb. v. Austin, 7 M. & G. 701, 725.

In 4 N. & M. 29 note, it is said, that by distinguishing between estoppel by indenture, which ceases with the cesser of the term, and estoppel by acceptance of possession, which continues till possession has been restored to the party from whom it was received, all the cases will be reconciled: When a landlord without title or possession demises, and the tenant afterwards enters and holds under

him, it would seem a reversion may be created by wrong. So the distinctions between the original parties and their assignees respectively, are material. At common law, the original landlord could declare in covenant or debt on the demise, without asserting any title to demise, but the assignees of the reversion, in declaring in-covenant by virtue of the statute 32 Hen. VIII. ch. 34, or in debt on the demise, and both the original landlord and the assignee of the reversion avowing in replevin for rent in arrear, were obliged to set forth their titles; the landlord in order to shew that he had a reversionary estate or interest entitling him to distrain; and the assignee to shew that the landlord had a legal reversion to which the rent was incident, which might be legally assigned—2 Bing. N. S. 411, *Whitton v. Peacock et al.*—and that he was such an assignee as the quality of the reversion required.—5 N. & M. 672, note; 1 Saund. 325 (4), 233 (4), 240, (3); *Carthew*, 209; 1 Sal. 562; 1 Ld. R. 331; 1 Bro. P. C. 77; 4 Bing. 646; Arch. N. P. 385; Arch. Land. & Tent. 179; *Stev. Plg.* 5th ed. 194, 344; 1 Chy. Plg. 347; 1 B. & C. 401; *Vivian v. Arthur*, 2 Lev. 206; *Platt on Covenants*, 527, *T. Jones*, 102.

And such assignment should, generally speaking, appear to have been by deed.—*Cro. Car.* 143; 3 Lev. 154; *Ba. Ab.* leases N. Comyn's Digest, Plr. 2 V. 2. 2. W. 14; *McClell.* 664; 6 Bing. 104.

Attornment to the assignee was also necessary until dispensed with by the statute 4 Anne, ch. 16, sec. 9, (and see stat. 11 Geo. II. ch. 19, sec. 11), *Vaughan* 39; 1 Str. 28; 108 Yel. 135; *Co. Lit.* 320 (a); *Gilbert's Tenures* 75; *Co. Lit.* 315, S. 567; 3 Lev. 22; 1 M. & G. 117. And where the assignee of the reversion was plaintiff or avowant, it was competent to the tenant or his assignee to traverse the title or reversion of the landlord as stated, as well as the derivative title of his assignee, unless estopped by deed or *in pais*—2 Saund. 207, C. (4) and *ib.* 418 (d) note; *Carvick v. Belgrave*, 1 B. & B. 531—said to have been questioned in *Warburton v. Ivey*, 1 Jones, 313 (*Irish Reports*), but confirmed by *Seymour v. Franco*, 7 L. J., Q. B. 18. In *Carvick v. Belgrave*, which was covenant by the

assignee of the landlord against the lessee for rent in arrear, the plaintiff stated that at the time of the demise to the defendant for nine years, from the 20th December, 1810, the landlord was possessed of the reversion of a term of twenty-two years from the 25th December, 1797, (not stating who was seised in fee, or who had demised to such landlord), and then alleging the defendant's entry and an assignment of the residue of the said term of twenty-two years to the plaintiff by indenture, &c.

The defendant pleaded that the landlord was not, at the time of the demise to him, possessed for the residue and remainder of the said supposed term of twenty-two years, *modo et forma*; which plea was on general demurrer held good, on the ground that the tenant was under no engagement to any one who was not the legal assignee, and had a right to know whether there was a privity between him and the assignee by means of the conveyance by the lessor of the true title; that as between the defendant and the landlord the estoppel was in full force, and had equal effect between the lessee and one who was privy, or in other words, derived title from the lessor; that the allegation of possession by the landlord of a term of twenty-two years being made by the assignee, the defendant could not be prevented from putting in issue any material fact alleged by the assignee; that the plea merely said, "the title you allege as that which was assigned to you, is not the true title." The want of a derivative title of the landlord, as himself a lessee for years, exceeding the duration of the subsequent sub-lease to the defendant, was not made a ground of objection; still this case tends to a distinction between the landlord and his assignee, as respects the doctrine of estoppel, though the demise was by indenture, and the defendant had entered under it.

Warburton v. Ivey, 1 Jones, 313.—In covenant by executor of a lessor, the plaintiff declared that the testator was possessed for the residue of a term of 999 years, and then stated a covenant to pay rent to the lessor and his executors, —It was held by the Court of Exchequer in Ireland, that the defendant could not traverse the allegation that the lessor

was possessed of the residue of said term *modo et forma*, for that a man who accepts a lease reserving rent to the lessor and his executors, must shew, if he controverts the executor's right to sue, who is entitled to the rent which he says the executor is not entitled to; and the court, although they distinguish the case of an executor from that of an assignee of the reversion, questioned the authority of *Carvick v. Belgrave*.

Seymour v. Franco, 7 L. J. Q. B. 18.—Covenant by devisee of lessor against assignee of lessee, plaintiff claimed through Salome Trust, and stated in the declaration that at the time of making the demise thereafter mentioned, Elizabeth Trust and Salome Trust were seised in fee of the premises in respect of which the rent was reserved; and being so seised, demised to one E. F. for 61 years at 8*l.* yearly—averred the entry of E. F. under the demise, the reversion being in the Trusts, the death of Elizabeth; and that Salome being sole seised of the reversion, devised it to plaintiff and died seised, whereby plaintiff became seised thereof. That the term passed by assignment from E. F. to defendant, and that after defendant (qu: plaintiff?) became seised, and after the assignment to defendant, rent became in arrear, &c. No entry by defendant was alleged. The defendant pleaded that the Trusts were not seised in fee as mentioned in the declaration. Demurrer—2 Stra. 818, Palmer and Eakins, relied on by plaintiffs; 1 B. & B. 531, *Carvick v. Belgrave*, relied on by defendant. Chitty, for plaintiff, argued that the lessee was estopped from traversing the title of lessor though he might shew by special plea that the lessor had a less estate than he claimed; but that he denied title altogether. Bailey, J.—“But you sue as devisee, and unless there was an interest in fee, it would not pass to a devisee. I quite approve of *Carvick v. Belgrave*. You, when sued by the assignee of a lessor, were at liberty to say he had not such an interest as could pass to his assignee.” Holroyd, J., concurred, saying—“the plea does not amount to *nil habuit*; it is merely a denial of the title, which the plaintiff avers has passed to him as assignee,” Littledale, J., of

the same opinion. "This is an action not by the lessor but by a stranger. He therefore should shew a title in the person as whose devisee he sues. The lessee may say the lessor had not such an interest as he could transmit to you." *Ryan v. Macaulay*, 1 Jebb & Symes, 324 (Irish)—Avowry for rent, stating an indenture of demise for years by A. to the plaintiff, reserving rent to A., his heirs and assigns—death of A. and that B. was his heir—death of B. and that the avowant was his heir, as well as the heir of A., and that the plaintiff enjoyed the *locus in quo* as tenant to the avowant, as such heir of A., by virtue of the demise, but not stating that either A. B. or the avowant, were seised of any estate; held bad upon general demurrer, if considered as an avowry at common law, and that upon *non tenuit* pleaded to such an avowry, a reversion would not be presumed in the defendant. A defendant in replevin will not be allowed to avail himself of the statute of general avowries to avoid setting out his title, and at the same time by adding specific facts to the common form of avowry, to deprive the plaintiff of the general defence under the plea of *non tenuit*.

I have not seen the report of this case, but as stated in 3 Stephens N. P. 2496, it is quite in point in favor of the plaintiff, if to be adopted as expressing the true rule of law on the subject.

The stat. 11 Geo. II. ch. 19, sec. 22, enabled landlords to avow in general terms (a), without setting forth the title, except so far as necessary to allege its continuance and the possession of the tenant, when the distress took place within six months after the expiration of the term, under the stat. 8 Anne, ch. 14, sec. 7.

And the assignee of the reversion could also avow under the first mentioned statute—*Roscoe*, 635; 2 Saund. 284 (3), *Ib.* c. d. (2); 6 Bing. 104; 10 A. & E. 204; 1 M. & G. 577; 7 Q. B. 708; and see 3 Stephens' N. P. 2501—that *non tenuit* puts a derivative title in issue.

The statutes 21 H. VIII. ch. 19, and 11 Geo. II. ch. 19, have operated materially to modify the old law between landlord and tenant, as applied to the doctrine of seisin

(a) *Roscoe on Real Actions*, 633-4.

and tenure, and avowries for rent; the effect being to relieve the landlord from avowing upon the very tenant or setting out his title, and as a consequence precluding the tenant from traversing his right to demise, or reversionary interest, otherwise than in so far as put in issue by the plea of *non tenuit*, or controverted by affirmative pleading.—Gilb. on Distresses, 171-2-3; 1 N. R. 56; 7 A. & E. 843.

The influence which the construction and application of those and other statutes have had upon proceedings in replevin, and the law of landlord and tenant, will assist in explaining what might be otherwise regarded as deviations from original principles.

The plea of *nil habuit* was admissible in debt on the demise, when the demise was not by indenture or by deed executed by both parties, and entry and enjoyment were not alleged—2 Wil. 208, 143; 1 Wil. 314; not when the demise was by deed executed by both parties, or after the tenant had entered under it, either during the term or so long as possession was retained after its expiration.—2 Lord Ray. 1550 & 1154; 2 Stra. 818; 6 T. R. 62; 7 T. R. 537; 8 T. R. 487; 2 Taunt. 278; 7 M. & G. 994; 2 Vent. 67; 2 Wil. 143, 208; 1 Wil. 314; Finlason's Leading Cases, 148 (notes).

In avowries at common law the tenant cannot plead *nil habuit*, but must traverse or plead to the title set out, and since the statute the plea is equally inadmissible.—2 Wil. 208, *Syllivan v. Steadling*; Holt's N. P. C. 489; Cro. Ja. 127; 2 Sal. 562.

As a general rule, the tenant cannot deny the right to demise, or dispute the landlord's title or right to possession after the term has ceased.—4 M. & S. 347; *Doe Knight v. Lady Smyth*—Dampier, J. (1835)—“Neither tenant nor any one claiming by him can controvert the landlord's title. He cannot put another in possession, but must deliver up the premises to his own landlord. This has been the rule for the last twenty-five years, and was so laid down by Buller on the Western circuit. In this case the tenant came in under an agreement for a term of years with the lessor of the plaintiff, and paid rent; the defendant de-

fended as landlady, without shewing how she was such.—9 Bing. 41; Co. Lit. 47 (b) sec. 58; 2 Y. & J. 88; Doe Nepean v. Budden, 5 B. & A. 626; Doe Bullen v. Mills, 2 B. & Adol. 17; Rennie v. Robinson, 1 Bing. 147; 1 Bing. N. S. 45, 2 Moody & Rob. 56; 1 Star. 305; 1 Saund. 325 (11); 1 T. & G. 17; 1 Car. & Mar. 78; Holt's N. P. C. 489; 10 A. & E. 204; 9 C. & P. 254; 10 Bing. 549; 2 M. & Scott, 107; 4 M. & W. 341; 2 A. & E. 17; 3 A. & E. 188; 1 Bing. N. S. 45; 2 Bing. N. S. 411.

Though where he was in possession at the time of the demise and did not enter under such landlord, he may in some cases—as of fraud, misrepresentation, or mistake—dispute his title, and shew that he had no right to demise, notwithstanding attornment and the payment of rent.—2 Bing. 10; 6 Taunt. 201; Rogers v. Pitcher, 7 A. & E. 447; 2 Moody & Robinson, 57. But in such cases, the existence of any demise, or the binding effect of any recognition of the landlord, as a lessor or landlord, is disputed. The object is to repel the relation of landlord and tenant—in the absence of which relation, no question concerning the reversion could arise. Or conceding a right to demise, and thereby evading the rule of estoppel, because an interest passed, the tenant might shew the landlord's title ended or assigned, and so rebut the inference of a continuing reversion.—1 Bing. 38; Finlason's Leading Cases, note, p. 148; Preece v. Cory, 5 Bing. 24; 4 Bing. 646; Pascoe v. Pascoe, 3 Bing. N. S. 898; Webb v. Austin, 7 M. & G. 701; Yel. 227; Skin. 307, 624; Cro. Ja. 312, S. C.; 3 Lev. 123; 2 Wil. 143.

Then it is laid down clearly that a demise for years as between the parties, imports a right to demise and a reversion in the landlord, sufficient to warrant a distress for rent where the tenancy is for years at a rent certain—Curtiss v. Wheeler, M. & M. 493; 2 Moore, 656; 8 Taunt. 593; Parmenter v. Webber, 4 Tyr. 776; 1 C. M. & R. 256-8; Hooker v. Nye, Cooper v. Blandy, 1 Bing. N. S. 45; Pascoe v. Pascoe, 3 Bing. N. S. 898; Ibbs v. Richardson, 9 A. & E. 849; Hall v. Butler, 10 A. & E. 204. Or to support ejectment after the term ended—Doe ex. dem. Knight v. Smyth,

4 M. & S. 349; M. & M. 346; 9 Bing. 41; 6 C. & P. 139; 8 C. & P. 536; 7 A. & E. 239; 1 Car. & Mar. 78; 1 Car. & Mar. 32; 7 M. & W. 594. Which reversion is presumed to be in fee.—*Green v. James*, 6 M. & W. 656; *Sturgeon v. Wingfield*, 15 M. & W. 228; 8 C. & P. 536; 5 Taunt. 326; 4 Taunt. 16, 17. And to continue till the contrary is shewn without been expressly averred.—2 Stra. 818, *Palmer v. Eakins*; 2 Lord Ray, 1550 (3); 3 Bing N. S. 183, 3 Scott 561; 15 M. & W. 224-8; 11 A. & E. 403; 12 A. & E. 356. In *Green v. James*, which was covenant by the surviving landlord against the tenant, upon a lease by indenture for not repairing, the defendant pleaded an assignment of the reversion, to which the plaintiff replied denying any such reversion; the replication was on special demurrer held to be a departure, on the ground that the declaration upon an ordinary lease imported a giving up to the lessor at the end of the term, which implied a reversion.

Lord Abinger said, “the lease imported to be granted by a lessor having the legal estate.” Alderson B.—“that the declaration stated in substance that the parties had a reversion, for it stated that they made a lease; surely the plaintiff is estopped from disclaiming the legal estate, if the defendant is from denying it.”—*Gouldsworth v. Knight et al.*, 11 M. & W. 338.

That the assignee of the landlord may avail himself of such an estoppel, see 2 Saund. 418 (a) 7 Q. B. 728; and *Sturgeon v. Wingfield*, 15 M. & W. 224—covenant by lessee against assignee of the reversion on a demise for 21 years by indenture, executed by both parties for not keeping down rabbits.

Pleas—that Hogarth did not demise to the plaintiff, and that the reversion never legally vested in defendant, and issue.

It appeared in evidence, that on the 12th of May 1742, the keepers or wardens and society of the Art or Mystery of the Broderers of the City of London, demised to Foster for 100 years, from Michaelmas, 1741; that on the 25th August, 1827, the residue of that term became vested in William Bray, and he, on the same day, by indenture, assigned such residue to Fleming, Elmslie, Gutch, and Green, by way of

mortgage, to secure 5000*l.* with interest, payable in twelve months. That afterwards, on the 22nd May, 1828, John Henry Hogarth, by indenture, demised to plaintiff for twenty-one years, and the reversion is stated to have come to the defendant on the 1st January, 1835. On the 12th January, 1836, by indenture, Fleming and Elmslie (Green being dead,) and Hogarth, surrendered to the Broderers Company, Gutch and defendant being parties to the said indenture. On the 13th January, 1836, the said company demised to Hogarth for 100 years, from Michaelmas, 1835, and on the 4th February, 1836, by an indenture, the unexpired residue became vested in defendant.

Parke, B., said—"There was a demise to the plaintiff by deed, and it therefore clearly operated by way of estoppel, that the reversion must be taken to continue in the same party until the contrary was shewn, as was decided in the House of Lords in the Bishop of Meath v. the Marquis of Winchester, 3 Bing. N. S. 214, 3 Scott, 561, and that the cesser of the reversion must be shewn by affirmative pleadings; that Hogarth had no legal reversion, because he (qu : Bray ?) had assigned all the residue of the term to the mortgagees, but there was a reversion by estoppel, which, whatever it was, was conveyed to the defendant; that there was but one reversion—the reversion by estoppel, and which had passed to the defendant; that, taking it, that Hogarth, in point of fact, had no interest at the date of the lease to the plaintiff, there was an estate by estoppel, which estate was *primâ facie* a reversion in fee; that in February, 1836, he made a conveyance to the defendant, which passed that reversion in fee, because it passed all his estate, right, title and interest, before which the Broderers Company had demised to Hogarth, and the estoppel was fed." Judgment was given for plaintiff.—7 M. & G. 701, 228 and note; Ibbs v. Richardson, 4 A. & E. 849; Pargeter v. Harris, 7 Q. B. 724; Disney v. Butler, cited *ib.* 718, 2 Hudson and Brook, 499 (Irish).

Cardwell v. Lucas, 2 M. & W. 112.—Covenant by devisee of lessor against lessee, upon a demise for eleven years, by indenture executed by the lessee only and not by the

lessor, held not maintainable, although stated that lessor was seised in fee, and gave possession to defendant, who entered and enjoyed. See 5 B. & C. 146.—Cresswell, for defendant, said, *arguendo*, “It is admitted that the lessee, having executed the lease, would be estopped from saying the lessor had no reversion, but that the question was whether the plaintiff was a reversioner,” meaning (as said by Lord Abinger) assignee of the reversion, to which the covenants in the instrument declared on were annexed.—Hooker v. Nye, 4 Tyr. 777; 2 Stra. 818; 2 Lord Ray, 1550; 1 B. & B. 531; 7 L. J.; 1 B. 18.

The authorities seemed therefore to present opposite principles.

1st, That at common law in avowries for rent by landlords, or in covenant, debt, or avowries by assignees of reversions, a definite estate or interest in reversion in the landlord must be alleged, owing to the old feudal doctrines of seisin and tenure, and the incidents attending privity of estate, and which title the tenant might controvert. 2ndly, That the very demise itself imports a reversion, which the tenant (being estopped from denying any right to demise) is virtually concluded from disputing, unless under circumstances shewing that some interest passed by the demise, when there would be no estoppel, and then that such interest had ceased or had been assigned, or (if no interest passed) that an eviction had taken place, or an attornment been compelled by some one entitled paramount the landlord, but without setting up the independent title of a stranger, unless after actual eviction.—See stat. 11 Geo. II. ch. 19, sec. 11. There is the tenant’s right to dispute the landlord’s title in reversion as against his assignee, opposed by the doctrine of estoppel *in pais* when the tenant has entered and enjoyed—attended with this difficulty, that if an ordinary demise for years, *proprio vigore*, imports a right to demise, and a reversionary interest [as a common law rule, the other common-law rule—that a landlord avowing, or his assignee declaring in covenant, or debt, or avowing, must state the landlord’s title in order to shew a legal reversion (and subject to its being traversed)—cannot well be

reconciled, unless upon the ground (destructive of the rule itself) that whatever presumptions may, *prima facie*, result from the demise, there is no estoppel, unless by deed indented, and that even entry and enjoyment by the tenant creates only a species of modern equitable estoppel in favor of the original landlord, more particularly in actions of ejectment, but not extending to his assignee as distinguishable from the strict common-law doctrine of estoppel *in pais* by entry—Co. Lit. s. 667, p. 332, (a); 2 Smith's Leading Cases, p. 472, note citing the case of Davis v Tyler; 18 Johns. 490, New York Rep.; or on the further ground as respects an assignee, that a person claiming as assignee of the reversion is a stranger (not effected by estoppel) seeking to substitute himself for the original lessor, and must necessarily shew that such landlord had a legal estate in reversion, to which the rent was incident, and that such estate had passed to him by assignment, the tenant being at liberty to deny the reversionary estate so alleged, because in the absence thereof no privity would exist between him and the assignee, and the establishment of such privity would therefore be a condition precedent to the right of the assignee to the rent, or to the benefit of the estoppel existing between the tenant and his landlord.

This view evidently refuses a presumed reversion in favour of the assignee, but the latter cases seem to inculcate a contrary doctrine.

A separation of the rights of the landlord and tenant before entry and after entry, and their relative rights during an *interesse termini*, from those accruing upon the possession being changed from the lessor to the lessee, may assist in reconciling much that might otherwise appear inconsistent; and taking all together, the most correct deduction seems to me to be, that an assignment of the lessor is bound to shew a reversionary estate in the landlord, and that the tenant may deny that any title he may allege is the true title, however that may be virtually equivalent to a right to plead *nil habuit*, but that *nil habuit* cannot be pleaded in terms; and that when entry and continued possession are averred in addition to the mere demise, the rule of estoppel,

as at present understood, concludes him, and prohibits the substantive denial of any subsisting estate of reversion; without shewing an interest originally, and that such interest had since ended. The difficulty is to reconcile the rule, that the assignee, unless when he avows generally under the statute, must allege the estate of his landlord, whether, in fee, for life or for years, and that the tenant may deny any and every title so asserted, and thereby raise an issue, the substance of which would be whether the landlord really had any reversionary interest of the description or quality stated (1 B. & B. 531), with the rule that a demise entry and enjoyment amount to an estoppel *in pais*, not only during the term, but so long as the possession is withheld after its termination. I think the spirit of the cases best answered, by admitting the estoppel to prevail under the circumstances supposed.

The present is the case of an assignee of the reversion avowing upon the assignee of the lessee (stat. 21 Hen. VIII. c. 19), within six months after the expiration of the term (stat. 8 Anne, ch. 14, sec. 7), and during the alleged continuance of the defendant's title and the possession of the plaintiff.

Neither party has pursued the usual course of pleading. The defendant avowing at common law, should have set out his title specially, shewing what estate or interest Leys had as reversioner, and making a good title to himself in *omnibus*; or under the statute 11 Geo. II. ch. 19, sec. 22, he might have avowed generally: whereas the avowry is more particular than the statute requires, but not specific enough at common law.—Roscoe on Real Actions, 633; 2 Saund. 284 (3); 1 Saund. 347 (3); Yel. 148; 6 Bing. 104; 10 A. & E. 204; 1 M. & G. 577; 7 Q. B. 708. Not being simply under the statute nor perfect at common law, the avowry might have been specially demurred to, and its sufficiency on general demurrer (except so far as aided by the defendant's pleading over), might have been questioned on this demurrer; but no objection thereto having been made in the margin of the demurrer books (Cameron's Rules, 23; and New Rules, Hilary Term, 13 Vic. p. 9), or raised at the argu-

ment, the court will not hold it ill, unless palpably bad. But the adoption of the proper forms of pleading is material as respects the *onus probandi*. If the defendant's title was set out in the avowry as at common law, the plaintiff might traverse it, not being estopped from denying any particular estate or interest in reversion that might be alleged to have subsisted in Leys, and to have been assigned to the defendant, and the onus of *primâ facie* proof would lie upon him. So the plea of *non tenuit* to an avowry under the statute, or even to this avowry, if admissible thereto, would throw the burthen of proof upon the defendant to establish a reversionary interest in the landlord and its assignments. But if a reversion is presumed from the *demise*, the statement thereof in the avowry, or proving such demise in evidence, would be *primâ facie* sufficient.—2 A. & E. 483. If upon the avowry, as framed, a reversion is *primâ facie* intended, the onus should be on the plaintiff to impeach the defendant's right to distrain by affirmative matter, shewing how it is that there is no reversion in him, and the burthen of proof would be shifted. No doubt the plaintiff, under a plea of *non tenuit* to an avowry under the statute, might at the trial, dispute a reversionary interest in Leys and the defendant's derivative title, subject to the doctrine of estoppel if applicable.

The plaintiff, however instead of pleading *non tenuit*, or shewing by affirmative pleading that Leys had no reversion at the time he assigned to the defendant, pleads negatively that he had no reversion, and concludes with a verification, and thereby inviting the defendant to state his title specially or to reply a reversion in general terms. The objections to the avowry are: 1st—That it shews the defendant to claim as the assignee of the reversion, and yet does not allege what estate or interest in reversion Leys had, or that he had any reversion to which he the defendant, by the assignment, acquired a good derivative title; or 2nd—assuming that a reversion in fee is implied in law, from the demise for five years, then that such reversion is not alleged to have been assigned by deed. The last is, I think, cured by the plea, which admits an assignment of all Leys' es-

tate and interest, and if he had any reversion that could have been assigned under those comprehensive terms, it was thereby transferred. As to the first, the plea on the face of it impliedly admits a reversion in Leys originally, without explaining how it ceased; it admits an assignment from Leys of all his estate and interest to the defendant; also that plaintiff, as assignee of Keyworth, held and enjoyed as tenant to the defendant as assignee of Leys, under a demise in writing, sufficient under the Statute of Frauds; also that the defendant's title continued (except so far as it somewhat inconsistently denies that he had any reversion); also that the plaintiff's possession continued. Whether Keyworth himself had entered under the demise from Leys before assigning to the plaintiff, or when the plaintiff entered as his assignee, does not appear, further than that it is alleged in the avowry that, as assignee of Keyworth, he held and enjoyed for three years and more next before the 31st December, 1848 (on which day the term for five years ended), as tenant to the defendant, who, during the said three years and more, was the assignee of Leys—whence the inference is, that the plaintiff entered as the assignee of Keyworth at some period subsequent to the lease from Leys, and held and enjoyed as such assignee during the three years in question—but whether he so entered before or after the defendant became assignee of Leys, is not explained.—8 Bing. 92; 4 C. B. 192 (b). The cases seem to establish that a reversion in fee and its continuance should be presumed upon the demise, as stated; and if so, the very statement of such a demise necessarily includes the allegation of a reversion in fee—6 M. & W. 565, 707; 15 M. & W. 224; 7 Q. B. 709—and whatever material fact is necessarily implied may be traversed, although not expressly averred (Stephens on Pleading, 225.) If, therefore, by reason of the defendant's having unnecessarily shewn on the face of the avowry, that he justifies and claims as assignee of the reversion, it was incumbent on him to allege an estate in reversion in Leys, as well as its assignment to himself, it is done by implication—at least I think it must be so regarded on this demurrer. A plea of *non tenuit* to

this avowry would have thrown the burthen of proof on the defendant (1 Leo. 301, 6 Taunt. 202); and then whether proof of the demise, the entry and enjoyment of the plaintiff, and the assignment to the defendant, if proved, would be sufficient evidence of a reversion in Leys, without more, would if rested on such evidence, have become a question at the trial. The plaintiff has, however, pleaded specially, denying any reversion in Leys at the time he assigned to the defendant, or in the defendant at any time; and the points arising on the demurrer to this plea are:

1st. Whether the demise to Keyworth, the assignment to, and the holding and enjoyment by the plaintiff, and the assignment from Leys to the defendant being admitted, sufficiently shew or import a reversion in the defendant, at the time when, &c.

2nd. If so, whether the plea is a proper answer thereto. The acceptance of a lease by parol, followed by entry and enjoyment, estops the tenant *in pais* from denying the landlord's right to demise, or disputing his right to restoration of the possession at the end of the term—in other words, disputing his reversionary interest, and when a reversion is established, it must, in the absence of anything to abridge it, be taken to be in fee, on the ground that possession *primâ facie* imports a fee.

The rules of presumption and the doctrine of estoppel become therefore material, for if in the avowry the only intendment is, that a reversion to some extent however short—a *scintilla*, as it were—a mere right to demise, and not a reversion in fee, as implied by law, and that the implied averment is not of any definite estate or interest, the plea might be good as traversing such implied reversion, although in that event, exceptionable on special demurrer, for concluding with a verification instead of to the country; and I have hesitated a good deal in considering whether this is not a correct view to be taken.—2 Will. 143. But the implication of a reversion involved in the undisputed right to demise, combined with the estoppel, resulting from entry and enjoyment, induced me to think a reversion in fee must be intended, that it is impliedly averred, and

that its continuance at the time of the assignment and at the time, when, &c., is also avowed by implication. Treating the avowry as sufficient, or not involved in this demurrer, and placing upon it the foregoing construction, the question remains whether the plea is valid. Had the plaintiff assumed the avowry to have averred that Leys was seised of a reversion in fee and traversed such estate (1 B. & B. 531) it would have formed another question. The plea is, that he had no reversion at all when he assigned to the defendant, and the cases seem to me to establish that the defendant, having held and enjoyed as assignee of the lessee of Leys, and still holding possession, is precluded by estoppel from denying a reversion in his landlord or his assignee, except by pleading affirmative matter consistent with a right to demise, which imports a continuing right, and therefore a reversionary interest, and shewing his title ended, assigned or determined, by some event subsequent to the demise; otherwise he might virtually plead *nil habuit*, for upon issue taken on the present plea, proof (if allowed) that Leys had no legal estate or interest at any time would support the plea.—Owen 51; 2 Saund. 207 (n), ib. 418; 3 Bing. N. S. 214; 3 Scott, 561; 6 M. & W. 656; 15 M. & W. 228; 7 Q. B. 708; 4 Tyr. 979.

But having apparently entered under the demise from Leys, and held and enjoyed and still holding over, he is estopped by act *in pais* from pleading *nil habuit*, or denying the legal right to demise for five years, or the landlord's right to possession after the term ended—in short, from asserting that he had no reversion. The plea is therefore a negative pregnant, impliedly admitting a reversion in Leys, which is presumed to continue, but denying its existence at the time he assigned to the defendant, without shewing how it had ended or been otherwise disposed of.

The object of the plea is to deny or displace any reversion in Leys at the time he assigned to the defendant, notwithstanding the plaintiff's continued possession as assignee of Leys' tenant. That Leys could distrain or maintain ejectment in this state of facts, had he not assigned, seems clear; and if so, why may not his assignee, to whom all his estate and interest have been transferred?—2 Taunt. 2.

Of the cases in which tenants have disputed reversionary interests in their landlords, many were between the immediate or original parties, and the special facts appeared in evidence under pleas of *non tenuit*, or on the face of the pleadings, sometimes shewing a cesser of the landlord's title, at others its transfer by assignment, &c., but all conceding a right to demise and a *prima facie* right in reversion (2 Will. 375 ; 2 Moore, 656 ; 8 Taunt. 593 ; 6 Taunt. 202 ; 7 Q. B. 708), or impeaching it on special grounds of deception or surprise, when the tenant had not entered under the landlord, as already observed ; in effect invalidating the lease *in toto* and *ab initio*, and of course preventing any presumptions as resulting therefrom.

In others it was shewn by affirmative pleading, as in *Preece v. Corry*, 5 Bing. 24, where the plaintiff pleaded that by the demise the defendant demised and granted the premises to the plaintiff for all the residue and remainder of his estate, term, and interest therein, and that he had not at the time when, or during the said demise to the plaintiff, any reversionary interest therein, &c. ; the plea traversed, that by the demise, all his estate, &c., was demised and granted, concluding to the country, and the case afterwards turned upon the evidence.

In *Pascoe v. Pascoe*, 3 Bing. N. S., 898, the pleadings were similar, and it came before the court on demurrer to the rejoinder to the replication to the plaintiff's plea.

Hartley et al. v. Jarvis, in the Q. B. U. C., a plea of the like kind, was held good on demurrer. In all of them, the plaintiffs admitting a right to demise, and that an interest passed (obviating the object of estoppel) denied any reversion in the landlords, because their title did not extend beyond the demise.

Being between the original parties, a reversion was *prima facie* assumed in all of them, and in the first *Preece v. Corry*), the onus of proof was properly on the plaintiff to shew that the demise to him had absorbed all the defendant's interest, without which a reversion would have been intended. In the second, the defendant endeavored to evade the plea by setting up an award, and in the third,

by demurrer, but without success. It may be that the pleas in *Preece v. Corry* and in *Pascoe v. Pascoe*, were so framed in order to avoid the objection of their amounting to *nil habuit*, by admitting an interest in the lessors co-extensive with the demise stated in the avowries, which the tenants were estopped from disputing, and their denying any reversion in general terms, thus giving color as it were, and they are, I think, susceptible of this view; but if so, it only shews the necessity felt for excluding the doctrine of estoppel, and shewing the want of a reversion consistently with an admitted right to demise. Had the defendant in *Preece v. Corry* replied that he had a reversion, the onus would have been on him to prove it, by proof of the demise and entry under it, if that would do, or by proof of title *aliunde*; but by traversing the affirmative part of the plea, the onus was properly thrown on the plaintiff. However, in the case of an assignee of the reversion, the onus of proof should properly rest upon him, and not on the tenant, whether the pleadings are at common law, or *non tenuit* be pleaded to an avowry under the statute; what will constitute sufficient *prima facie* evidence thereof, always forming a question for the court at the trial. The present plea therefore, if good in itself, only calls upon the defendant to state in reply, what he ought to have stated in his avowry (not being under the statute) wherein he claims to be entitled as assignee of the reversion, or what he would have been obliged to prove at *Nisi Prius*, had he taken issue on the plea, or upon a plea of *non tenuit* to a general avowry. This is however met by the argument of estoppel appearing on the face of the avowry, and that the plea as framed, if it does not virtually amount to *nil habuit*, argumentatively affirms that Leys's reversion had ceased, without shewing how, and argumentatively denies that the defendant's title continued, without shewing why an assignment of all Leys's interest was ineffectual to confer any reversion or continuing estate in the defendant. If the plaintiff is estopped from denying a reversion in Leys and the defendant, that is an answer to the plea; if not, he is at all events estopped from alleging or proving that Leys had not any right to

demise, and if he had such right, it must be presumed to continue. He had a reversion by implication, and the plaintiff should have shewn how his title ended, and did not pass to the defendant by assignment.

He cannot retain possession as a tenant at sufferance, holding over, after the end of his term, while the situation of the landlord's title remains unaltered (except that it has been assigned to the defendant), and at the same time deny any reversion (tantamount to denying a right to possession) without asserting an eviction or a coerced attornment to a paramount landlord. He could not even set up the title of a stranger without shewing eviction, nor can he evade the landlord's presumptive right except on grounds consistent with its original existence, and this should be done by affirmative pleading, stating the nature of his title or interest if less than a fee, and not by the mere denial of a reversion originally or at any future period. Anything destructive of the reversion accruing since the demise should be distinctively affirmed; for while possession is retained the implied reversion or right of possession cannot be expressly, and therefore not indirectly, denied, either *ab initio* or at any subsequent point of time, without its being stated how or when it ceased.

There is nothing on the face of the avowry to render Leys's title questionable, nor does the plea distinctly impeach it, and if the plaintiff is estopped as to him, the assignment to the defendant having at least transferred the residue of the term, an interest passed, and all Leys's estate and interest having been included in the assignment, the defendant became entitled to the estoppel or the presumed reversion to which the rent would be incident.

If a right to distrain is established in Leys by implication or estoppel, that right is by the assignment transferred to the defendant, the assignee of all his estate and interest. Taking the avowry by necessary implication to aver that Leys was seised of the reversion and continued so seised until and at the time he assigned to the defendant, and that such reversion was assigned to the defendant, who continued seised thereof, until and at the time when, &c.;

the plea is not that Leys was not so seised, or that such seisin in him had otherwise ceased, before the assignment to the defendant; but that Leys had no reversion at the time of such assignment. Had the avowry expressly averred seisin in fee and its assignment, as above supposed, surely such a plea concluding with a verification, and requiring the defendant to repeat the allegation that Leys was seised at the time he assigned, would be exceptionable on special demurrer, on the ground that it was argumentative, not a direct answer to the avowry, and did not shew affirmatively, the cessation of Leys's original seisin in fee before the assignment to the defendant, although it indirectly or argumentatively implied that such reversion had ceased at some period subsequent to the demise, and in some manner not pointed out.

I find no precedent or authority warranting a plea like the present.

Without therefore being able satisfactorily to reconcile all the cases, or the ancient rule of the common law touching actions or avowries by assignees of reversions, with the developments of the doctrine of estoppel and the applications of legal presumptions between landlord and tenant in modern authorities; and without at present questioning the tenant's right to compel the assignee to state his title, or his right to shew the non-existence of a reversion *sub modo*, it appears to me the soundest solution of the present case as before us on these pleadings, is to hold the plea insufficient.

McLEAN, J.—Distress for rent. Plaintiff replevied the goods, and has brought this action to try the validity of defendant's right to distrain.

The defendant's third avowry sets forth that the plaintiff, for the space of three years and more next before and ending on the 31st December, 1848, held and enjoyed the said land and premises in which, &c., (being the said ninety acres before mentioned), with the appurtenances, as tenant thereof to the defendant, under and by virtue of a certain demise thereof in writing, before then made by one Francis Leys to one John Key-

worth, for five years from the 1st day of January, in the year of our Lord 1844, at a yearly rent of 4*l.* 10*s.* The plaintiff being the assignee of all the estate and interest of the said John Keyworth in the said land and premises, with the appurtenances, and the defendant, before any of the said rent hereinafter mentioned became due, and after the making of the said demise by the said Francis Leys to the said John Keyworth, and during all the said three years and more, being assignee of all the estate and interest of Francis Leys in the said land and premises, with the appurtenances, in which, &c., (the same being the ninety acres aforesaid), from the *said first* day of January in the year of our Lord 1846, until and at the same time when, &c., and because 13*l.* 10*s.* of the rent aforesaid—that is to say, for three years ending on the 31st day of December, 1848, at the said time when, &c.—was due and in arrear and unpaid to the said defendant—defendant well avows the taking of the said cattle in the said declaration mentioned, in the said place, which, &c., (being the ninety acres aforesaid), at the said time when, &c., (being within six calendar months after the said 21st day of December, 1848), and *during the continuance of the said title of the said defendant* in the said land and premises, with the appurtenances in which, &c., (the same being the ninety acres aforesaid), and during the possession of the said plaintiff, and justly, &c., for and in the name of a distress for the rent so due, in arrear, and unpaid; and which said rent now remains due, in arrear, and unpaid; and this the defendant is ready to verify, &c.: Wherefore he prays judgment, and a return of the said cattle, together with his damages, according to the statute, &c., to be adjudged to him.

5th plea to the foregoing avowry: That the said Francis Leys, in the said third avowry mentioned, had not at the time *when he assigned all his estate and interest* in the said ninety acres in the said avowry mentioned, nor had the said defendant *at the said time when, &c., or at any time whatever*, any reversionary estate, term or interest, of or in the premises, with the appurtenances in which, &c., or any part thereof, expectant upon, or to take effect upon, or at any

time after the expiration of the term, granted to the said John Keyworth, by the said demise, and this the plaintiff is ready to verify.

Demurrer to this plea ; Because the plaintiff attempts to put in issue, that Francis Leys had not at the time he assigned all his estate and interest to the defendant, nor had the defendant at that time *or at any time whatever*, any reversionary estate, term, or interest, of or in the premises in which, &c., or any part thereof, expectant upon, or to take effect upon, or at any time after the expiration of the term granted to John Keyworth by the said demise, without shewing that *the estate* of the said Francis Leys had before the said assignment *thereof, expired or been transferred or conveyed by him to any other person, or what had become thereof*, or that the estate and interest of the defendant *had expired*, or been conveyed, or transferred, by him the defendant, to any other person, or what had become thereof. And for that the said 5th plea is an *attempt* by a tenant to put in issue the *title* of his landlord under whom he holds, to the premises held by him as such tenant.

The defendant avows the taking of the plaintiff's cattle for three years' rent, said to be due on the 31st December, 1848; on a certain demise of the premises in writing, made by one Francis Leys to one John Keyworth, for five years, from the 1st January, 1844, at a yearly rent of 4*l.* 10*s.*, and he alleges that the plaintiff was the assignee of the lessee Keyworth, and that he (the defendant) was the assignee, before and during all the three years while the rent was accruing, of all the *estate and interest* of Francis Leys in the land and premises in which, &c., from the 1st day of January, 1846, until the time of the distress, which the declaration alleges to have been made on the 22nd, February, 1849. The plaintiff denies the defendant's right to distrain for any rent, on the ground that neither he nor Francis Leys, at the time of the assignment, had any reversionary estate, term, or interest, in the premises expectant upon or to take effect upon, or at any time after the expiration of the time granted to Keyworth by the demise from Leys. By this plea the plaintiff admits that the defendant

is the assignee of Leys, and that he is himself the assignee of Keyworth. He admits also the demise and the term granted to Keyworth by Leys, but resists *the remedy* by distress for rent in arrear, alleging in general terms that the defendant had not *at any time* any reversionary estate or interest in the premises.

To entitle the defendant to collect rent in arrear, he must be entitled to a reversion—2 Wils. 375, 2 Moore 659; 5 Bing. 24; 1 T. R. 441; and as the law presumes when a demise is made, that the reversion is in the landlord, and that therefore he has a right to distrain, any question as to the reversion must be raised on a special plea. The plea of *non tenuit*, as it appears to me, would only put in issue the holding of the premises under the defendant, and would be answered by the production of the lease and proof of the assignment of the term by Keyworth to the plaintiff, unless indeed, as in the case of *Gregory v. Doidge et al.* (3 Bing. 474), it could be shewn that the lease or the assignment of it was obtained by misrepresentation or fraud, or in ignorance of the lessor's title, or that the title had expired before the distress. In the case of *Gregory v. Doidge et al.*, the court was clearly of opinion that the plaintiff having come into possession *under a former owner*, and having entered into an agreement to pay rent to the defendant in ignorance of the *defect* in the defendant's title, might shew that the defendant was not his landlord. They considered the principle to be clearly established by the case of *Rodgers v. Pitcher* (6 Taunt. 202), and the language of Buller J., in *Williams v. Bartholomew* (1 B. & P. 326):—"If the tenant could have proved that his attornment proceeded on the misrepresentation of him who claimed as remainderman, he might have proved that another was still alive and entitled;" and the case of *Fenner v. Duplock* (2 Bing. 10), was mentioned as precisely in point, in which it was holden that payment of rent by a lessee to a lessor, after the title of the lessor had expired, and after the lessee had notice of an adverse claim, did not amount to an acknowledgement of title in the lessor, or a virtual attornment, *unless* at the time of payment the lessee knew the precise nature of the

adverse claim, or the manner in which the lessor's title had expired.

In the case of *Doe Plevin and Newhall v. Brown et al.*, assignees of John Platt, which was an ejectment brought by parties to whom rent had been paid, Lord Denman says, "no case has decided that it would not be open to the tenant to explain under what circumstances he made any attornment *or other acknowledgment*, and the case of *Gregory v. Doidge et al.* is recognized as a strong and direct authority to that effect. Upon the broad principle however, Lord Denman says, that it is always open to a party not guilty of laches, to explain and render inconclusive, acts done under mistake or through misrepresentation; the verdict in that case, which was against the lessors of plaintiff, to whom the rent had been paid, was sustained.

In the case of *Claridge v. McKenzie* (4 M. & Gr. 151), Tindal, Ch. J., says—this is an action of trespass brought for two distresses; the question is, whether the plaintiff, who now disputes the legality of these distresses, is at liberty to do so, or whether he is not precluded by a rule of law, that a tenant cannot dispute the title of his landlord. I think it clear, he says, that the plaintiff had a right to shew what were the circumstances under which he entered into the agreement with the defendant—a right to shew the jury that at that time he was ignorant of the real facts as to the defendant's title; and in a note to this case the reporter says, "the plaintiff would have placed himself in the position of being liable to pay the amount of the rent over again to the Duke of Portland (in whom the title in fact was), either in the shape of mesne profits or as a compensation for the use and occupation." Coltman, J., in the same case says—"With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent, if he can shew that it was paid under a mistake."

From these cases and from the case of *Cornish v. Searall* (1 M. & Ry. 703, 3 B. & C. 471), and other cases, it appears to me that a tenant who attorns to a party from whom he did not receive possession, is not estopped from shewing want

of title in such party.—2 Q. B. 256; 5 B. & Ad. 1065; 2 Bing. 10; 6 Taunt. 202; 2 N. & P. 592. If then the plaintiff had in fact attorned to the defendant, and acknowledging him as his landlord, had paid him rent, he would nevertheless in this action be at liberty to shew the want of title to enable him to *distrain*. The defendant seems to admit, by the grounds of special demurrer assigned, that if the plaintiff had pointed out in his plea, what has become of the estate, or how the defendant or Leys, under whom he claims, became divested of it, the plea might have been sufficient. If indeed the title had been transferred, and that fact could be traced and proved by the plaintiff, or if it had expired from any cause known to the plaintiff, he would be safe in stating these facts in his plea; but if in truth the lessor never had any title, and he induced the lessee to take a lease from him under a misrepresentation, perhaps undesigned, as to his title, and the tenant subsequently discovered the true state of the title, and that he would be liable over for mesne profits to the actual owner of the land, I cannot see that he is not at liberty to plead that the party is not entitled to the reversion, and *therefore* not entitled to *distrain for rent*. The defendant must be aware of his own title; and if he has the reversion, the plea is easily met; if he has it not, then he cannot be entitled to a remedy for his rent, which belongs only by law to the *reversioner*, and must have recourse to the agreement or lease, to recover it in an action. It is true the title of the lessor may be called in question by the tenant in disputing his right to this particular remedy; but so it may in all cases of fraud or misrepresentation, and in all cases where the whole term has been assigned, and no reservation has been made of a right to *distrain*. The defendant's avowry says he distrained *during the continuance of his title*; the plaintiff replies that he never had a title which *authorized him to distrain*, inasmuch as he never had and has not the reversionary interest. Under that issue, it is, I think, competent for the plaintiff to shew in whom the title has in fact been all along, and if he can shew that it has been in any other person than the party claiming rent, he

must succeed in replevying the property distrained for such rent.

The objection that the plaintiff, by his plea, attempts to put in issue the title of his landlord, is I think answered by the authority of the cases which I have cited, the whole of which I think shew that a tenant may dispute the right of any party except him from whom the immediate possession has been obtained.

SULLIVAN, J.—The plaintiff in this case declares in replevin: and the defendant in his third avowry says that the plaintiff, for the space of three years and more next before and ending on the 31st December, 1848, held and enjoyed the land and premises, in which, &c., as tenant to the defendant, under and by virtue of a certain demise thereof in writing, before then made by Francis Leys to one John Keyworth, for five years from the 1st day of July, 1844, at a yearly rent of four pounds and ten shillings. The plaintiff being assignee of all the estate and interest of the said John Keyworth in the said lands and premises, with the appurtenances; and the said defendant, before any of the rent hereinafter mentioned became due, and after the making of the said demise by the said Francis Leys to the said John Keyworth, and during all the said three years and more, being assignee of all the estate and interest of the said Francis Leys in the said lands, &c., from the 1st day of January, 1846, until and at the said time when, &c.; and because, &c., the defendant avows.

The plaintiff, in his fifth plea to the third avowry, says, that the plaintiff ought not to avow, &c.; because he says that the said Francis Leys had not, at the time when he assigned all his estate and interest, nor had the defendant at the said time when, &c., or at any time whatever, *any reversionary estate*, term or interest of or in the premises in which, &c., or any part thereof, expectant upon or to take effect upon or at any time after the expiration of the term granted to the said John Keyworth by the said demise; and this the plaintiff is ready to verify, &c.

To this plea the defendant demurs, assigning the following causes: first, that the plaintiff, in and by his fifth plea,

attempts to put in issue and shew that the said Francis Leys had not, at the time he assigned all his estate and interest in, &c., nor had the defendant at the said time when, &c., or at any time whatever, any reversionary estate, term or interest, expectant upon, or to take effect upon, or at any time after the expiration of the term granted to the said John Keyworth, without shewing that the estate of the said Francis Leys had, before the said assignment thereof, expired, or been transferred, or been conveyed by him to any other person, or what had become thereof; or that the estate or interest of the said defendant had expired or been conveyed or transferred by the said defendant to any other person or persons whomsoever, or what had become thereof: and for that the fifth plea is an attempt by a tenant to put in issue the title of his landlord, under whom he holds the premises held by him as such tenant.

No other objections are taken in the margin of the demurrer book, and the plaintiff takes no objection to the avowry.

At common law, the defendant avowing in replevin, because he seeks a return of the goods seized, and is therefore in the situation of a plaintiff, is said to be bound to shew a good title *in omnibus*: his avowry must contain sufficient matter to entitle him to a return. In an avowry for rent, he has to shew seisin in himself or in the person under whom he claims; and if not seised himself, he must deduce title in pleading from the person seised; he must shew the quantity of estate for which the party having the seisin was seised. "The commencement of the particular estates must be set out—as, that such a one was seised in fee and demised—because the seisin in fee may be traversed, and any of the mesne assignments;" and when a termor who had made an under lease, avowed for the rent, it was necessary for him to state a seisin in fee, and to shew the creation of the term and the conveyance of it to himself.—Roscoe on Real Actions, 635; 2 Sal. 562; 1 Ld. Ray. 381; 1 Bro. Parl. Cases, 249, 525; 2 Saund. 284, d. n. 3

This is more than is required in actions of covenant and debt for rent, in suits by the immediate lessor against his

lessee. The reason is obvious : in these cases, the demand lies in privity of contract, and may or may not be accompanied with a privity of estate ; but in covenant by the assignee of the reversion—i.e., when the assignment is after the lease—the demand is founded on the privity of estate, and the same particularity is required in the declaration, as in the avowry for rent at common law, and the same matters are traversible.

1 Wm. Saunders 233 (2)—“The assignee of the reversion must set out the title of the lessor ; also that it may appear he had such an estate in reversion as might legally be assigned to the plaintiff.” And even when the demise is stated to be by indenture, it has been decided that the lessor or his assignee may traverse the title set out by the plaintiff, as well as that of the original lessor.—Carvick v. Belgrave (1 B. & B. 513) ; Vin. Ab. title D. ; Willett v. Boscomb (11 M. & A. 179).

In debt on a demise—as between the lessor and lessee—where the demise is not stated to be by indenture, and where in the declaration, an entry by the defendant is not stated, the defendant may plead *nil habuit* ; for no estoppel appears, and there is no debt unless an estate passes.—Curtiss v. Spitty (1 B. N. C. 15), Lewis v. Willis (1 Wils. 314, Lit. sec. 5, 8). But the plea of *nil habuit* is not good if the lease is stated to be by indenture, for then the estoppel appears ; and if *nil habuit* be pleaded, and the lease be by indenture, the estoppel may be replied. If in debt for rent, the plaintiff states in his declaration that the defendant has enjoyed under the demise, the defendant is estopped from pleading *nil habuit*, for then he is estopped from denying the title under which he has enjoyed. Such an estoppel, however, cannot be replied, for it has been held to be a departure.—1 Leon, 136 ; 3 Leon, 303 ; Com. Dig. Plead. F. 7, F. 8.

Thus in these forms of action the law appears uniform in its operation on the rights of landlord and tenant. In none of them is the tenant permitted to dispute the title of his landlord, when that relation fully subsists. In replevin, the allegation of the avowry is that the plaintiff enjoyed

under a demise. This, whether the demise be by indenture or by parol, is an estoppel, as in debt, when entry and enjoyment are stated in the declaration. Accordingly, *nil habuit* is in all cases, a bad plea in replevin.

It is very difficult to reconcile this rule of law with the decisions which permit the plaintiff in replevin, and the defendant in covenant, to traverse the seisin or other estate set out in the avowry in replevin, or the declaration in covenant, when the avowant in the one, or the plaintiff in the other, happens to be, not the lessor himself, but his assignee. In the case of *Carvick v. Belgrave* (1 B. & B. 531), Dallas, C. J., gives an explanation of the rule which permits the defendant in covenant to traverse the estate of the lessor as set out by his assignee in the declaration. "It is assumed (he says) that the question is the same as it would have been if Seth Thomas had brought the action, and alleged himself possessed of the term of twenty-two years in the manner here alleged." The answer to this is, "that in such an action by Seth Thomas, the defendant would have been estopped from disputing the lease; and the court must have treated such an allegation as mere surplusage; for, as between him who had accepted the demise and his lessor, it was wholly immaterial what the title of the lessor was. Between them the estoppel was in full force. *This estoppel has equal effect* between the lessee and one who is privy, or, in other words, derives his legal title from the lessor; but the lessee is under no engagement to any one who is not the legal assignee. The allegation of the possession by Seth Thomas for a term of twenty-two years, is made by the assignee and not by Seth Thomas; and the lessee has a right to know whether there is a privity between him by means of a conveyance of the true title by the lessor. From the nature of the case, he cannot be prevented from putting in issue any material fact alleged by the assignee. The case of *Palmer v. Ekins*, Ld. Ray. 1550, was very different from the present case; the court thought the plea there amounted to the plea of *nil habuit*. *It admitted on all hands that there is no difference between a general and special plea of nil habuit.* If

the effect of a plea is to dispute the interest which a lessee took from a lessor, the plea is bad whatever shape it assumes. The present plea leaves the lease in the state in which the plaintiff had stated it, and the defendant merely says "the title you allege, is not the true title."

On reference to the case of *Palmer v. Ekins* (Ld. Raym. 1550), it will be found that the plaintiff sued in covenant as assignee for non-payment of rent, and stated in his declaration that John Palmer was seised in fee and demised to the defendant; and being seised of the reversion in fee, conveyed it to the plaintiff by indenture of lease and release. The defendant pleaded that John Palmer was seised in fee before the lease, and that he conveyed to one John Bragg in fee, also before the lease; *absque hoc*, that the said John Palmer at the time of the lease, was seised in fee *modo et forma*. The plea was held bad.

The distinction between these cases made by Dallas, C. J., is very subtle. It amounted to this—that in *Palmer v. Ekins*, if the defendant had contented himself with a simple denial that at the time of the lease John Palmer was seised in fee, the plea would have been good as not denying title in the lessor, but as denying the seisin in fee to be the true title; but as he shewed a title in fee in another in the inducement to the special traverse, the plea was a special one of *nil habuit*, and was therefore bad.—4 Co. 53; 1 Salk. 276.

In the case of *Gouldsworth v. Knights et al.* (11 M. & W. 337), which was an action of trespass *de bonis asportatis*, where the justification set up, was a seizure for rent under the general issue by statute, Baron Parke says: "Another answer was given by the court to my brother Byles's application, which I notice, that we may not be supposed to have acquiesced in his argument. It was this: the plaintiff had paid rent to the old trustees more than once, and this was no doubt evidence of a new taking under them as tenant from year to year; and such new taking precluded the plaintiff from contesting the title of the old trustees, and consequently that of the new trustees, who claimed under them by assignment by deed, and had a good title by

estoppel, supposing that the estate had already passed to the corporation of church-wardens and overseers. But my brother Byles contended that as the old trustees had no title at all, nothing would pass by their grant to the new trustees; and he referred to two recent cases as establishing this proposition, which the court has since had an opportunity of examining. Neither of these cases is applicable. The first was that of *Whitton v. Peacock et al.* (2 Bing. N. C. 411), in which the substance of the marginal note is, that if a person who has an equitable estate only, demises by deed, and then conveys the reversion, the assignee cannot maintain an action on the covenants in the lease. The point decided was this: a copy-holder devised his estate, without surrendering to the use of his will; the devisee of the devisor, who, of course, had no estate at all, either legal or equitable, demised part of the copy-hold by deed; and the lessor covenanted to pay rent, and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copy-hold to the same lessee; and instead of granting a fresh lease to the lessor, of the part before demised, took a covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the copy-hold to another, and the question was, whether the surrenderee could maintain an action on the covenants against the assignee of the lessee. The court held, most properly, that no such action would lie. No reasons are given, but there is clearly a satisfactory one, for the reversion by estoppel on the first lease, was not a copy-hold transferrable by surrender and admittance. The other case referred to was *Doe Higginbotham v. Barton*, (3 Perry & Davidson, 194). In that case the plaintiff, who had only an equity of redemption, granted a mortgage to the lessor of the plaintiffs, who brought an ejectment; and the defendants, the tenants, were permitted to shew that there was a prior mortgage, and that the first mortgagee had given them notice to pay to him. This was equivalent to shewing eviction by title paramount."

This case is to be reconciled to that of *Carvick v. Bla-*

grave, exactly as that case is made by Dallas, C. J., to agree with Palmer v. Ekins. In all these cases the tenant is estopped from denying title in his landlord, and this I think clearly extends to reversion; but where seisin and mesne assignments have to be shewn, as in covenant, the particular seisin may be traversed, not as denying title to demise or as denying reversion, but as denying that the title set out was the true title; and the reason for the distinction seems to be, that the avowant in replevin or the plaintiff in covenant does not set out the seisin or other estate of the lessor, for the purpose of shewing title in him or reversion in him, which the plaintiff in replevin and the defendant in covenant is estopped from denying, but for the purpose of disclosing an estate upon which the mesne assignments will act, so as to vest a title in the assignee; the consequence of this distinction would be, that any plea denying title, *i. e. all title* in the lessor, and which would be *nil habuit*, and any plea denying reversion, which is of precisely the same nature, would be bad; the particular seisin or reversion set out may be traversed, but not *all title* or *all reversion*.

The case of Whitton v. Peacock, explained by Parke, B., was from Chancery, and no reasons were given for the judgment; the inaccurate marginal note has caused the case to be often quoted as establishing a doctrine which the judges never intended.

In Green v. James (6 M. & W. 655), which was an action for not repairing and for not leaving in repair, and in which consequently it was necessary that the plaintiff should have a reversionary interest—though as the action was between lessor and lessee, there was no occasion to set it out—the defendant pleaded, that from the time of making the demise, the plaintiff was lawfully possessed of a certain reversion after the determination of the lease—to wit, a reversion for the residue and remainder of a certain term of thirty-four years; and that before any of the breaches of covenant, the plaintiff had granted the reversion to another. The plaintiff replied, that he was not possessed of the reversion *modo et forma*. This was held to be a departure; for

the plaintiff being the lessor as well as the lessee, was estopped from denying a reversion.

This case is perfectly in accordance with the subsequent case of *Gouldsworth v. Knights et al.*, which I before remarked upon. It may be considered as opposed to the doctrine of *Dallas, C. J.*, and the early authorities, in asserting that the particular estate alleged in pleading may not be traversed; but without setting the cases in opposition to each other on this point, which is immaterial to the present question, it is plainly the opinion of the court that both the lessor and lessee are estopped from denying a reversion, as much as they are estopped from denying a title to make the demise.

In the case *Webb v. Austin* (7 M. & G. 721), *Tindal, C.J.* seems in some degree to question the authority of *Gouldsworth v. Knights et al.*, saying that "the opinion expressed by the court of Exchequer is not easily reconcileable with *Whitton v. Peacock* or *Carvick v. Blagrove*; for if the doctrine laid down in *Gouldsworth v. Knights* be correct, and the tenant in such case is estopped from denying the assignee's right to distrain, the ground of that decision must be, that a tenant is not merely estopped from denying his landlord's title, but is also estopped from denying that he had a reversion which is capable of being assigned."

The explanation of *Parke, B.*, as to the case of *Whitton v. Peacock*, I have already given. I have also endeavored to reconcile *Gouldsworth v. Knights* with *Carvick v. Blagrove*, which I think can be done from the language of *Dallas, C. J.*, himself. He concedes the estoppel, as between the assignee of the reversion and the tenant, and only insists that the identity of the estate of the lessor, as set out by the assignee, may be traversed; but *Gouldsworth v. Knights* is authority not to contradict this, but to shew that even in evidence, the lessee is not permitted to shew that at the time of the lease the lessor had no estate, or after the making of the lease no reversionary interest. In the case of *Sturgeon v. Wingfield* (15 M. & W. 229), *Parke, B.*, does not retreat from the opinion expressed in *Gouldsworth v. Knights*. It is true that in that case as in

the case of Webb v. Austin the estoppels were fed, and the leases which at first were good by estoppel became good in interest; but in the course of the argument he remarks—"the reversion must certainly be taken to continue in the same party (the lessor) until the contrary is shewn." This was decided in the House of Lords, in the case of The Bishop of Meath v. The Marquis of Winchester (3 Bing. N. C. 215.) The cesser of the reversion must be shewn by affirmative pleading. Here therefore, the defendant ought to have shewn it. Hogarth no doubt had no legal reversion, but there is a reversion by estoppel, which, whatever it was, was conveyed to the defendant. The case of The Bishop of Meath v. The Marquis of Winchester (3 Bing. N. C. 183, 215), was an action of *quare impedit*, where a plea was pleaded which amounted to a traverse of the plaintiff's alleged title—"without this, that the plaintiff is possessed of the said advowson *modo et forma*." The court after stigmatizing the plea as an anomalous and unheard of traverse, refused to admit in evidence under it, a fine which would have divested the advowson from the line of descent stated in the count; for they say, that if the title in fee or in tail is once admitted or proved in any person, it must be intended to continue in that person without any allegation that it does so continue, until the contrary is shewn; and the cesser of that estate by conveyance or otherwise, is affirmative matter which ought to be shewn by a special plea on the other side.

Seymour v. Franco (7 L. J. Q. B. 18, 1828), is a case which I do not find elsewhere reported. It was an action of covenant for rent, brought by the devisee of the lessor against the assignee of the lessee. The declaration alleged that two persons were seised in fee of the premises, in respect of which the rent distrained for was recovered, and that they were possessed of another parcel of ground for the remainder of a term of sixty-two years, and being so seised and possessed, they demised; that the tenant entered; that one of the lessors died; that the survivor devised to the plaintiff, and that the term passed by assignment to the defendant. The defendant pleaded, that the lessors were

not seised and possessed *modo et forma*. This plea was demurred to, and held bad for traversing too much ; but the authority of *Carvick v. Blagrove* was recognized—Bayly, J., saying, “You, when sued by the assignee, are at liberty to say, that the lessor had not such an interest *as would pass to his assignee*.” I take the court to mean, from the language used by the judges, that the defendant was at liberty to traverse the estate set out by the assignee, because as in *Carvick v. Blagrove*, it depended upon the quality of that estate, whether it would or would not pass by the assignment set out ; but the case by no means upholds the doctrine that the defendant is at liberty to deny the existence of a right to demise or of a reversion.

The case of *Pluch v. Diggs* (2 Bing. N. S. 31), shews that under the plea *non tenuit*, in replevin, the plaintiff may shew by affirmative evidence the demise to be an assignment by operation of law.

None of these cases shew that a plaintiff in replevin, or a defendant in covenant, can deny all title in the lessor or all reversion ; they prove that the tenant may deny the estate *set out* by the assignee of a reversion, or may shew the demise to be an assignment by operation of law ; and for these doctrines there are good reasons. But I am not able to reconcile the doctrine of estoppel, as I think it now plainly upheld by the courts, with the ancient rule of pleading, which in replevin obliged the lessor himself to plead his title in his avowry, and which enabled the tenant to traverse the title avowed upon. The statute of 11 Geo. II. relieves the landlord, whether the lessor or his assignee, from the necessity of shewing his title, and when the avowry is under the statute—consequently deprives the tenant of the power of traversing the title of the landlord ; but yet, in avowries at common law, the old rule seems to continue, even between the lessor and his immediate lessee ; and I do not see how it is to be reconciled with the rule which estops the lessee from denying his landlord’s title without shewing a cesser of title. But after all, there is no judgment or precedent, ancient or modern, which countenances a plea denying all title or all reversion, and such a plea

would, I think, at all times have been considered either a general or limited plea of *nil habuit*, and therefore bad.

Indeed the privilege of the tenant to traverse the particular title set out by the lessor, seems to follow as a necessary consequence upon the rule which obliged the lessor to shew his title in his avowry; for how else could the tenant shew the lessor's estate to be less than the one stated in the avowry, and so at an end, without violation of a universal rule in pleading, that no issue can be made of two affirmatives? It is therefore the common-law rule abrogated by the statute, that forced the lessor to avow specially upon his title, which is inconsistent with the doctrine of estoppel, and not the necessary consequence of that rule, which was the admission of a traverse of the lessor's title when specially pleaded. But, however decidedly one may be forced, in a case where a landlord chooses to avow at common law, to hold him to set out his estate specially and to admit of a traverse of the title set out, in mere obedience to ancient precedent, there can be no such compulsion to admit a tenant to negative all title in all reversion or the lessor; nor can such a negation of title be in any respect made good, merely because, instead of demurring when the title or estate of the landlord is not specially pleaded in the avowry, the plaintiff elects to plead over, the plaintiff cannot be the less estopped from denying any or all reversion in the avowant, merely because the avowant has not, by setting out his estate specially, given him the opportunity of traversing the special matter which should be, but is not, contained in the avowry.

Pascoe v. Pascoe (3 Bing. N. C. 898) has been cited to shew a denial of a reversion in the avowant; but in that case the plea was no such denial, but it was an affirmative statement, that by the demise in the avowry and cognizance mentioned, the defendant demised and transferred the premises to the plaintiff for all the residue of his estate, term and interest; and that he had not at the time when, &c., or at any time during the demise to the plaintiff, any reversionary estate, term or interest expectant upon or or to take effect after the expiration of the term,

This was held good on general demurrer; or rather, the demurrer being by the defendant to a subsequent pleading, it was only liable to objections, as upon general demurrer; and amongst them, it was not liable to the objection of its amounting to the plea of *non tenuit* or *non demisit*, either, or one of which, would have put the same matter in issue. The meaning given to the plea by Tindal, C. J., is not that it is a traverse of any thing, but that it alleges with sufficient certainty that Pascoe the younger, at the time of making the demise, did not reserve any reversion in himself, and consequently, without any express provision for the purpose, has no remedy by distress—in other words, that the instrument set up as a *demise* was in fact an assignment. I think it would be absurd to say that this case is any authority against the doctrine of estoppel, when a demise is established, or in favour of a plea traversing the reversion.

In *Parmenter v. Webber* (J. B. Moore, 656; 8 Taunt. 593), the same defence to an avowry was successfully set up under the plea of *non tenuit*. Also in *Preece v. Corry* (5 Bing. 24), *non tenuit* was pleaded, as well as a plea similar to that in *Pascoe v. Pascoe*. The jury found for the defendant *in replevin*, on the plea of *non tenuit*, and for the plaintiff on the plea that the demise transferred all the defendant's interest. The court upheld both findings, on the ground that though the demise in question, being by parol, and for a short period, and therefore not requiring to be by deed, had the operation in law of an assignment, yet it might be considered for some purposes a demise, and therefore the jury properly found it a demise on the plea of *non tenuit*; but that being an assignment by operation of law, no reversion was left, and therefore no distress.

According to this class of cases, therefore, it would appear that the plaintiff in *replevin* is not estopped from shewing that the demise avowed upon, was such an one as to depart with all the defendant's interest, and to leave no reversion—or in other words, he is not estopped from shewing the demise to be an assignment, by operation of law, of all the defendant's interest, so far as duration of estate is concerned. These decisions are far from controverting the

doctrine that a demise, properly so called, always imports a reversion, which the lessee is estopped from denying by mere traverse, though they do shew that the cesser of the landlord's estate may be pleaded by affirmative pleading. In *Pascoe v. Pascoe* and *Preece v. Corry*, the estoppel is avoided by the plaintiff's attacking the demise, and shewing that it was not such a demise as would import a reversion. The issue joined in *Pascoe v. Pascoe* was on a replication, that by the demise the defendant did not part with all his estate, term, and interest—he did not take issue upon a supposed traverse of his having a reversion.

These cases, therefore, do not shew that it is competent to a lessee or person who has enjoyed under a lease, to deny by simple traverse, the fact of there being a reversion in the landlord at the time of the demise, or at any time afterwards. The demise, if by indenture, or by deed poll, or by parol, accompanied by enjoyment on the part of the lessee, estops landlord and tenant equally, from denying a reversion. The reversion presumed from the demise, is a reversion in fee simple. The lessee is not estopped by this presumption, if he can set up by affirmative pleading any lesser estate, consistent with the lessor's right to demise, and he can shew a cesser of that estate; but this is not a traverse—it is an affirmative plea, which the opposite party may traverse, and which leaves the *onus probandi* of the affirmative matter, upon the party pleading: he cannot support his plea by negative evidence or by proof of imperfection, or want of title in the lessor, but by proof of cesser of title in the manner he has pleaded it.

The situation of the parties is somewhat different where, as in an avowry at common law, or in a declaration in covenant, the avowant or plaintiff, being assignee of a reversion, is obliged to shew a derivative title, as in *Carvick v. Blaggrave*. In such cases the plaintiff in replevin and the defendant in covenant is not estopped, according to the authority of that case, from traversing the particular seisin or other title of the lessor, as set out in the avowry or in the declaration. And why is this? It is because, without shewing the actual estate of the lessor, the court cannot

judge of the validity of the mesne assignments; and therefore the identity of the estate of the lessor may be traversed; or, to use the words of Dallas, C. J., in *Carvick v. Blagrove* "the defendant may deny that the title set out, is the true title."

To illustrate this position, it is only necessary to shew the consequences of an opposite doctrine. Let us suppose the plaintiff in replevin estopped from traversing the seisin or other estate of the lessor, especially set out in the avowry, then it would follow that the defendant could set out any title in the lessor he pleased, so as to accommodate it to his assignments; for example, the true title may be copy-hold, and his only derivative title under it, may be by devise in the ordinary form, without any surrender to the uses of the will; but he may make the devise good by avowing a fee simple in the lessor, and thus without any title by assignment recover, provided that the plaintiff were estopped from denying the particular seisin or title set out in the avowry. Or to take a more familiar case—the real title, or estate of the lessor, may be for a term which could only be assigned by deed, or by a demise, in writing, according to the Statute of Frauds, and his assignment may be not by deed, or it may be by parol, but by setting out a false title or estate in the lessor, capable of being assigned, or underlet, by such an assignment, or underletting, as he can prove his derivative title would be made good, if the plaintiff were estopped from denying the premises, estate, or title, of the lessor, as set out in the avowry; this would be contrary to truth and justice, as well as to legal principle, for the estoppel in such case, would not only deprive the tenant of the opportunity of disputing the lessor's title, but it would take from his right of disputing the mesne assignments with effect.

Thus there is a good reason for the decision in *Carvick v. Blagrove*, without that case being held as authority for a traverse of any estate, or any reversion, or rather of all estates, or of all reversions; perhaps it would have been more consistent with the justice of the case, to have held that it would have been no departure for the defendant to

set out in his plea, another title in the lessor, and to shew a cesser of that title, instead of traversing the one set out—but for this, authority and precedent were wanting; and hence arose the necessity for the nicety of distinction between the traverse of the title set out, and the plea of *nil habuit* adopted in that case.

The doctrine of estoppel is well illustrated in the case of *Pargeter v. Harris* (7 Q. B. 208). It was an action of covenant by the lessor, for non-payment of rent. The declaration set out a demise, which recited an outstanding mortgage, granted by the lessor before the demise. The defendant pleaded an assignment of the reversion after the demise. The plaintiff replied, traversing a reversion in himself. The court held, that the declaration shewed there was no reversion, and the demise itself, as set out, shewed it. If the defendant did not assent to this, he should have denied the demise, neither the lessor nor lessee upon *such* demise was estopped from denying a reversion; the plea was bad for passing over the averment in the declaration, which shewed the plaintiff had no reversion. The replication denying the reversion was no departure, there being no reversion: the covenant was a covenant in gross, which could not be assigned, therefore the plaintiff was entitled to sue upon that covenant, and accordingly he had judgment.

But in this case it appears to me to have been admitted on all hands, that but for the recital in the lease, there would have been an estoppel against both landlord and tenant, from denying a reversion; and this is strictly in accordance with *Green v. James*, which I have mentioned before, where the lessor was held estopped from denying a reversion on an ordinary lease, and it was said that the estoppel was *mutual*. *Noakes v. Ander* (Cro. El. 373, 436, 437), was a case like the last; there it appeared, upon the plaintiff's own declaration; that he had no title, and that nothing passed by the assignment but an estoppel, which, when it is thus shewn by the plaintiff himself, is sufficient to bar his own right.

Parker v. Manning (7 T. R. 537), was an action of cove-

nant by the assignees of the bankrupt. The declaration set out no title in the lessor. The defendant pleaded a plea shewing title in another, and traversed any title in the lessor at the time of the demise. The court held the defendant estopped, on the authority of *Palmer v. Ekins*; and on general principles it was objected in this case, that the declaration being by assignees, should have shewn title, but this was overruled, probably because the assignees were the assignees of a bankrupt. But the court further held, that the objection, if good, should have been taken on *special demurrer*—an opinion which may be of consequence in this case, when the avowry comes to be considered.

In *Cooper v. Blandy* (1 Bing. N. S. 48), which was a case of replevin, the defendant avowed under the statute 11 Geo. II. The plea was *non tenuit*. The proof was, that the plaintiff had received possession from a former occupier, who had succeeded another, who had succeeded another, who, as the defendant could inadvertently prove, had taken a lease from a person who was *cestui que trust*; and he proved title under the trustees, by virtue of a decree of the Master of the Rolls. The defendant proved however, that Perry, the second occupier, had paid him rent. It was held that the payment of rent *estopped* the plaintiff from disputing the title of the defendant, though the payment was by his predecessor, and notwithstanding that the defendant inadvertently had shewn that he was not the assignee of the original lessor. It was necessary in this case, that the defendant should have the reversion, and the estoppel consequently was to deny the reversion; and it seems that it could not be denied even in evidence, nor even upon evidence produced by the defendant himself.

Hooker v. Nye (4 Tyr. 776), is authority to shew that the statement of a demise necessarily includes the statement of a reversion; the *presumption* is that the landlord has the *freehold*. If the landlord's right has *determined*, that question should be raised by the replication. There is a *prima facie* right in the landlord to distrain, and the *onus* is on the other party to shew that such a right does not exist.

In the absence of the statement of title, of course only a fee

or freehold could be presumed, but any lesser estate may be shewn by replication, and a cesser of that estate. The presumption of fee simple is only presumptive until the lesser estate is shewn, but the reversion is by estoppel until the cesser is shewn. If, from the consideration of the relative position of landlord and tenant in these actions of debt, covenant and replevin, we turn to the action of ejectment, I think the law will be found uniform, and accordant with the principles to be gathered from the foregoing cases—that is to say, that a tenant who executes an indenture of lease, or who comes in under such a tenant, is, in all places, and at all times, while he continues in possession, estopped from denying the right of the lessor to grant the lease, and also from denying a reversion. In the action of ejectment, it is to be observed, that it is only in the nature of a reversion, that the landlord, any more than any one else, is entitled to possession on the expiration, or sooner determination of the demise.

In *Doe Marriott v. Edwards* (6 C. & P. 208), it was held, that if a lessor, who has only an equitable interest, grants a lease, he has in ejectment against the lessee, a good title, by estoppel, but if the lessor, after granting the lease, conveys all his estate, legal and equitable, to a mortgagee, the lessee may shew this to prevent his lessor from recovering possession on a forfeiture of the lease.

Doe Knight v. Smith, the tenant who entered under the lessor of the plaintiff for a term of years, which was expired, did not defend; but the defendant Lady Smith, defended as landlady, and sought to set up her own title in opposition to that of the lessor. It was held that she could not do this, that the tenant must give back possession to the lessor, and after that the defendant may have her ejectment. *Dampier J.*—"It has been ruled often, that neither the tenant nor any one claiming under him can dispute the landlord's title. He cannot put another person in possession, but must deliver up possession to his own landlord; this I believe has been the rule for the last twenty-five years, and I remember it was so laid down by Buller, J., upon the western circuit."

Doe Manton v. Austin et al. 9 Bing. 41. In this case the law as laid down in Doe Knight v. Smyth, was affirmed, with this addition, that the lessor of the plaintiff was not the original lessor, but claimed under a devise.

In Doe Tiffany v. Miller, and other cases, the same doctrine has been repeatedly laid down in the Court of Queen's Bench in this Province.

Amongst the foregoing cases, the following treat the assignees of the reversion as entitled to the same benefit by the estoppel, from denying reversion, as the lessor himself: Palmer v. Ekins, Doe Manton v. Austin, Gouldsworth v. Knights et al., Sturgeon v. Wingfield. I think from the language of Dallas, C. J., in Carvick v. Blgrave, the same opinion may be implied.

It seems to me that if I were to hold the contrary doctrine, the assignee of the reversion, when the title was infirm, would be without remedy. If it could be shewn by merely negative pleading or evidence, that the lessor had bad title, or only equitable title at the time of the lease, or by any other means than cesser of the estate, the assignee could not bring covenant; for then, there being no reversion, the covenant would not run with the land: he could not bring debt; for, according to the authority of Pargeter v. Harris, the assignee would be the person having the remedy; the assignment would be an assignment of a *chose in action*; he could not bring assumpsit for use and occupation; for not to mention the objection that the lessee does not occupy by his permission, the action would not lie, when there is a demise by deed; he could not bring ejectment during the continuance of the demise, and yet if the authorities be correct, he might have his ejectment afterwards; it is true that in case of an assignment for the residue of the lessor's interest, these remedies may exist in the assignees, but that is a state of facts to be shewn by affirmative pleading, when the remedy by distress is sought to be avoided.

I can find no precedent as authority for a plea denying that the lessor or his assignee had a reversion. I think all the reasoning in the cases I have read, are against such a

plea; I think it amounts to a plea of *nil habuit*, which it must do if there be an estoppel, from denying a reversion, as between landlord and tenant. But, it may be objected, that the avowry in this case, is not under the statute of 11 Geo. II., and that therefore the avowry itself is bad, or the plea good? I am inclined to agree that the avowry is not under the statute, and unless cured by the plea, that it must be held bad, and that it would be bad on special demurrer, but I do not think the plea is good on that account. It is true that the plaintiff by a demurrer may have forced the avowant to amend by setting out his title, or to avow under the statute, and if the avowant set out the title, the plaintiff on the authority of *Carvick v. Blagrove*, and of many old cases, would have then been permitted to traverse the title set out; but this is no reason why he should be permitted to set up a defence in pleading, which in no circumstances he could set up in evidence, under any general plea, or be permitted to allege in any form of action.

In the case of *Banks v. Angell et. al.*, 7 Ad. & El. 843, the defendant avowed that the plaintiff held and enjoyed the premises as tenant to the defendant, under a certain demise of the premises made by one John Angell to one William Wescombe, for a certain term of years, not yet expired; the defendant then shewed the plaintiff Banks to be assignee of the lessee, but he shewed no assignment from John Angell to himself; this avowry was held not good under the statute of Henry VIII., nor under the statute 11 Geo. II., nor at common law, because it shewed a demise by one person, and no connection or privity was shewn between him and the avowant.

The avowry in the present case is not open to the same objection, for the privity between the lessor and the defendant is sufficiently set forth. It would not be so upon special demurrer, but the plea admits the assignment in terms; as an avowry at common law it would be bad, as not showing seisin, and as not deducting title from that seisin.

But this very objection was taken in the case of *Parker v. Manning* (7 T. R. 537). The plaintiffs in covenant in that

case were the assignees of a bankrupt. It is probable that the objection in such a case would not have availed, even on special demurrer; it was objected then that the assignees should have shewn title, the court decided that there was no weight in the objection, and that if there were, the defendant should have demurred specially.

In *Bowler v. Nicholson* (12 Ad. & El. 341), which was an action of trespass *de bonnis asportatis*, the defendant justified, under a distress for rent, for goods fraudulently removed under the statute 11 Geo. II. The plea did not set out the title to demise, nor the demise except generally, as in an avowry under the statute; the plea did not state who, or that any one demised. The statute does not permit this general form in trespass, but the court held it to be good, after replication of *de injuria* and upon general demurrer, even if it were bad on special demurrer. I think these two cases shew that we should not notice the want of stating title. The same objection existed in *Banks v. Angell*, and was not noticed at all. The plea seems in a manner to admit title at the time of the demise, and nothing but such an implied admission of title would save the plea from being at first sight a plea of *nil habuit*; and this being so, if the plaintiff has forgone the advantage of being able to traverse something, that in point of form, the defendant should have pleaded, he should not now take advantage of it, or rather, the court should not notice the deficiency, particularly when the statement of the demise, according at least to modern authorities, is a statement of a title by estoppel, and when the necessity of stating title specially is scarcely consistent with the modern doctrine.

There is a note of an Irish case quoted in 3 Stephen N. P. 2496, which would go to shew the contrary; it is to the following effect (a):—"An avowry for rent, stating an indenture of demise by A. to B., his heirs and assigns, the death of A., and that B. was his heir as well as the heir of A., and that plaintiff enjoyed the *locus in quo* as the tenant of the avowant, as such heir of A., by virtue of the demise, is bad on general demurrer, not shewing that A., B. or the

(a) *Ryan v. Macaulay*, 1 Jebb. & Symes, 324.

avowant was seized of any estate, and upon *non tenuit* pleaded, a reversion will not be presumed in defendant."

This could not have been a case decided upon demurrer, but upon the effect of a plea of *non tenuit*. I do not agree to the doctrine laid down in the note. I incline to follow the cases I have cited, as to general and special demurrer; and I cannot at all assent to the notion, that upon a demise by indenture a reversion will not be presumed in the assignee. It is impossible, without seeing the case itself, to judge accurately of its value, or to say how far the propositions of the note are borne out by it; but I cannot think the decision, as stated in the note, is good law.

I have forbore to allude to several cases where payment of rent or attornment, under a mistake, have not been held to estop the tenant; these are exceptional cases, proving, if anything, the general rule that he who enters and enjoys under a demise, shall not dispute the lessor's title or his reversion. These cases were considered of importance in the trial of the issues joined in this case, though I do not see how even then they can apply, for the plaintiff at all events, if not the lessee, came in under the demise. In this case he entered, claiming that title, and no other, and is in the same position as if let in by the landlord himself.

Upon the whole case, I am of opinion that the plea in question in this case, is in the nature of a plea of *nil habuit*, that it traverses what the plaintiff is estopped from denying—namely, the reversion in the lessor, without shewing a cesser of that reversion by affirmative pleading; and I think the avowry, though informal and liable to objection on special demurrer, or even perhaps on general demurrer, cured by the plea pleaded, by the plaintiff. I think, therefore, that judgment should be for the defendant.

Judgment for defendant on demurrer.

LYNETT V. PARKINSON.

In Replevin.

A. was in possession of the premises in question, without title thereto. B. came to him and represented himself as owner of said premises, when in fact he was not. A., by writing, agreed to lease from B. for five years, at a rental of 4*l.* 10*s.* This writing was signed by A. alone.

Held, That under such circumstances, A. could dispute B.'s title to said premises on the grounds of fraud and misrepresentation.

Held also, in such a case, when the jury found for the plaintiff, upon a special plea setting up fraud in procuring such lease to be signed, and also for the defendant upon the issues of *non tenuit*; that the defendant was not entitled to judgment *non obstante*.

Held also, that when upon some of the issues, the jury had found no verdict, a new trial should be granted without costs.

Declaration, dated 12th June, 1849, states that defendant in a close called lot No. 29, in the 3rd concession of Vaughan, took certain cattle of the plaintiff, &c.

1st plea: Except upon ninety acres, to wit, ninety acres of the south-half of number, twenty-nine, 3rd concession of Vaughan, *non cepit*; concluding to the country.

1st avowry: As to said ninety acres, being the place in which &c., defendant well avows &c.; because John Keyworth, for three years and more next before and ending on the 31st December, 1848, held and enjoyed the said land and premises, in which, &c., being the said ninety acres, &c., as tenant thereof, to the defendant, under a demise thereof in writing, made by Francis Leys to the said Keyworth, for five years, from the 1st of January, 1844, at 4*l.* 10*s.* yearly rent. The defendant, before any of the rent after mentioned became due, and after the said demise, and during the said three years and more, being the assignee of all the estate and interest of the said Leys, in the said lands and premises, and the said Keyworth continued and was in possession thereof from the said first of January, 1844, until and at the said time when, &c., and because 13*l.* 10*s.* of the rent aforesaid, for three years, ending on the 31st December, 1848, was due and in arrear and unpaid to the defendant, defendant well avows the taking of the said cattle, in the said place in which, &c., at the said time when, &c., being within six calendar months after the said 31st December, 1848, and during the continuance of the title of the said defendant to the said lands, &c., and during the possession of the said Keyworth, as a distress for the said rent, &c.; concluding with a prayer of return, &c.

2nd avowry : Defendant well avows, &c., because the plaintiff for three years and more next before and ending on the 31st of December, 1848, held and enjoyed the said lands and premises, in which, &c., as tenant thereof to the said defendant, under and by virtue of a demise thereof in writing, before then made by Francis Leys to John Keyworth, for five years, from the 1st January, 1844, at the yearly rent of 4*l.* 10*s.*, the plaintiff being the assignee of all the estate and interest of the said Keyworth, in the said land and premises, &c.; and the defendant, before any of the rent aftermentioned became due, and after the making of the said demise, and during all the said three years and more, being the assignee of all the estate and interest of the said Leys, in the said lands and premises, &c., and the plaintiff continued and was in possession of the said land and premises, &c., in which, &c., (being the ninety acres aforesaid) from the 1st January, 1846, until, and at the said time, when, &c., and because 13*l.* 10*s.* of the rent aforesaid, for three years, ending the 31st December, 1848, at the said time, when, &c. was due and in arrear, and unpaid to the defendant, defendant well avows taking the said cattle &c., in, &c., and the said time, when, &c., being within six calendar months after the 31st December, 1848, and during the continuance of the title of the said defendant in the said land and premises, &c., and during the possession of the said plaintiff, in the name of a distress, &c., for the rent aforesaid, &c., concluding with a prayer of return, &c.

3rd avowry : That defendant for all the term during which the rent aftermentioned was accruing due, and from thence until, and at the time when, &c., was landlord to the plaintiff of the said land and premises, &c., being the said ninety acres, &c. ; and plaintiff for the space of three years, ending the 31st December, 1848, and from thence until, and at the said time, when, &c., held and enjoyed the said lands, &c. as tenant to the defendant, under a certain demise thereof, made at, and under a certain rent, to wit, the yearly rent of 4*l.* 10*s.*, and because 13*l.* 10*s.* of the rent aforesaid, for three years ending as aforesaid, and from thence until, and at, &c., was due and in arrear from plaintiff to defen-

dant, defendant well avows taking the said cattle, &c., in the place in which, &c., as, and for a distress for the said rent, &c.

Pleas.—1st. Similiter to the first plea (treating it as being the first avowry).

2nd. To first avowry (treated as the second avowry): that the said John Keyworth did not hold and enjoy the said ninety acres in the said avowry mentioned, as tenant thereof, to Francis Leys, under the supposed demise thereof therein mentioned, *modo et forma*, concluding to the country.

3rd. To second avowry (treated as the third avowry), that plaintiff did not hold the said ninety acres therein mentioned as tenant thereof to the defendant, *modo et forma*; concluding to the country.

4th. To second avowry: That plaintiff was not at the said time, when, &c., the assignee of the said Keyworth therein mentioned, *modo et forma*, concluding to the country.

5th. To second avowry: That the said Francis Leys had not at the time when he assigned all his estate and interest in the said ninety acres, &c., nor had the defendant at the said time when, &c., or at any time whatever, any reversionary estate, term, or interest, of or in the premises in which, &c., or any part thereof, expectant, or to take effect upon, or at any time after the expiration of the term granted to the said John Keyworth, by the said demise; concluding with a verification.

6th. To second avowry: That at the time of making the said demise therein mentioned, one Samuel DeReemer was, and from thence hitherto hath been, and still is seised and possessed of the fee simple of the said land, in the said avowry mentioned, in reversion to him the said DeReemer, his heirs and assigns forever, and at the time of making the said supposed demise by the said Leys, as therein mentioned, the said Keyworth was induced to become tenant of the said premises in the said avowry mentioned, to the said Leys, by the fraud, covin and misrepresentation, of the said Leys and others in collusion with him; *without this*, that the said Leys at the time of the making of the said supposed demise, had then, or at any

time before, or since, ever had any estate, right, term, or interest whatever in the said premises ; concluding to the country.

7th. To third avowry (treated as the fourth avowry), that the plaintiff at the said time, when, &c., therein mentioned, did not hold the said land in the said avowry mentioned, as tenant thereof to the defendant, under and by virtue of the supposed demise in the said avowry mentioned, *modo et forma* ; concluding to the country.

Replications.—To 2nd, 3rd, 4th, 6th, and 7th pleas, similiter ; to 5th, special demurrer.

The case was tried before Mr. Justice Sullivan at the Spring Assizes (1850) for the County of York. On the part of the plaintiff, it was proved that his cattle had been distrained on the south part of lot numbered 29, 3rd concession of Vaughan. His counsel then produced an exemplification of a government patent, dated the 6th of April, 1797, granting 1000 acres of land, including lot No. 29, 3rd concession of Vaughan to Samuel DeRiemer, his heirs and assigns for ever ; also the exemplification of a judgment in an ejectment suit of John Doe ex dem. Lewis DeRemer v. William Lynett for the same premises, in which judgment of nonsuit had been entered, the connexion of which with this case, the learned judge who tried the cause said he did not see. For the defendant an instrument in writing was produced in the words following :—Know all men by these presents, that I, John Keyworth, of the township of Vaughan, in the Home District, have this day agreed with Francis Leys, of the township of Pickering, in the Home District, Esquire, to rent that part of lot No. 29, in the 3rd concession of the township of Vaughan, for five years, from the 1st of January, 1844, which I now occupy, containing about 90 acres, for which I am to pay the said Francis Leys, his heirs or successors, the yearly rent of of 4*l.* 10*s.*, to be paid in money at his house in Pickering, at the expiration of each year, as witness my hand at Pickering, the 16th day of November, 1843.

“(Signed) JOHN KEYWORTH.

“(Signed) GEORGE BEGS, Witness.”

It was not sealed nor was it signed by Leys. It was in evidence that Keyworth was in possession before Leys went there—that the plaintiff's father bought possession of the land from Keyworth, who went out of possession five years ago, when the plaintiff's father went in, and that he had been heard to say (apparently while in possession) that he had got possession of Keyworth—that the plaintiff's father went in first, and that the plaintiff was there backwards and forwards, and that they were on the lot together, until the plaintiff (apparently) became sole possessed. The defendant also proved a deed indented, executed under seal by Francis Leys only, dated the 19th day of November, 1845, whereby in consideration of 100*l.* he granted, bargained, and sold to the defendant, his heirs and assigns, all and singular that parcel or tract of land, &c., being the south half of lot No. 29, 3rd concession of Vaughan, 100 acres more or less, excepting such part as might have been sold for taxes, and the reversion and reversions, &c., rents, issues and profits thereof, &c., and all the estate, right, title, interest, claim or demand of the said Leys, in law or in equity, of, in and to the said premises and every part thereof, *habendum* to the said defendant, his heirs and assigns for ever; provided that the words grant, bargain and sell therein used should not be construed as amounting to a warranty for the title to the said premises, the same being intended to operate merely to pass his interest and estate therein.

The defendant also called the said Francis Leys and his professional adviser. The latter stated that he had in the year 1843 acted as the said Leys's counsel and conveyancer in the purchase of this land—that the said Leys and a person calling himself Samuel DeDeimer or DeRiemer came to him, and submitted the question of the heirship of the last mentioned person to the grantee of the crown, as the said Leys was desirous of purchasing the property if he was the heir; that this person represented that although called DeDeimer his name was DeRiemer, and made such representations as (fortified by enquiries otherwise instituted by such professional agent) induced him to believe that he was really such heir-at-law, and to advise the said Leys to con-

tract with him; that Leys thought he was getting a good title, although he incurred some risk of difficulty in proving it, which probably caused a less sum to be given than would otherwise have been paid. The said Leys himself denied any fraud in inducing Keyworth to take the lease, but stated that he had said to him that he was the owner, as he believed he was, having bought of a person who represented himself to be the son of the patentee of the crown and the owner, and under the advice of counsel, but that he heard of the title being doubted afterwards. No title or conveyance to him (Leys) was proved. On cross-examination he said he bought 1000 acres at the time, for which he paid 12*l.* 10*s.* down, and was to give 250*l.* when the title was made good; that he had represented to Keyworth that he had a good title; that he went up to Vaughan to take possession, and that the lease was executed at his house in Pickering, and that he had sold all his interest in the land.

The learned judge charged the jury—

1st. To find the first issue in fact for the defendant.

2nd. To find the second issue in fact, as to a demise from Leys to Keyworth, for the defendant.

3rd. To find the 3rd issue for the defendant, if the jury thought the plaintiff went in under Keyworth; otherwise, for the plaintiff.

The 4th issue in fact was overlooked.

The 5th issue was an issue in law on demurrer.

On the 5th issue in fact, it was left to the jury to find whether there was any fraudulent representation, in the absence of which the defendant was not bound to prove his title, and they were told to find for the plaintiff if there was fraud, but that the learned judge did not think there was evidence of fraud.

The 6th issue in fact was not particularly noticed.

It was left open to the jury to say whether or not the plaintiff went in under his father, and whether his father was put in by Keyworth or went in independently as a wrong-doer.

After the jury had retired, the plaintiff's counsel objected that the question of fraud ought to have been left to the jury

under the 3rd issue, but it had been left to them under the 6th issue, without objection or request that it should be also left to them under the third issue ; also, that the jury should have been told that Leys, having represented (although honestly) that he was the owner when he was not, was a legal fraud, sufficient to avoid the lease and to let in the denial of his title ; also that what Lynett's father had said was only hearsay evidence and inadmissible.

The learned judge considered his declarations inadmissible, as referring to a time when he was in possession, and left it to the jury as legal evidence, if they were satisfied that he was at the time in possession, &c. As to the imputed fraud, the learned judge did not think there was sufficient evidence thereof, and that the effect of admitting such evidence would be to allow a tenant to dispute his landlord's title, contrary to the well settled rule on that head.

The pleadings were in great confusion, from the pleas treating the first avowry as the second, the second as the third, and the third as the fourth, thus leaving the first avowry unanswered. The cause was left to the jury to find certain points, which being found, were misapplied to the issues on the record.

The verdict is entered as found for the defendant on the 1st, 2nd, and 3rd issues, and for the plaintiff on the 4th issue, with damages assessed at 2*l.* 10*s.* on the whole record, including the demurrer. The jury did not assess the amount of the rent in arrear, or the value of the cattle replevied, nor did the defendant pray the learned judge to direct the jury on those points, as required by the statute 17 Car. II. ch. 2, sec. 2 ; 2 Wil. 41 ; 1 Taunt. 218 ; 5 B. & C. 284.

The 5th and 6th issues in fact, were inadvertently overlooked in recording the verdict, and the issue intended to have been found for the plaintiff, was the fifth and not the fourth issue of fact. The plaintiff did not move against this verdict ; but in Easter term, 13 Victoria, *Grant*, the counsel for the defendant, obtained a rule calling on the plaintiff to shew cause why judgment should not be entered for the defendant on all the issues in fact, notwithstanding

the verdict; or why the verdict on the issue found in favor of the plaintiff should not be reduced to nominal damages, and judgment entered for the defendant on all the issues in fact, except the issue in fact found for the plaintiff for the sum of 13*l.* 10*s.*, being the amount of rent avowed for; or why judgment should not be entered for the defendant on all the said issues for the said sum of 13*l.* 10*s.*; or why the verdict rendered for the plaintiff should not be set aside as contrary to law and evidence, and the judge's charge, with costs to abide the event.

Bell shewed cause in Trinity term.

Grant, for the defendant, contended that the plaintiff was estopped; that the 6th plea only set up a defective title in Leys, without alleging any eviction, but admitted that he had enjoyed—that the plea did not shew who had a better right to demise—that the reversionary estate in De Riemer, as alleged, does not shew on what temporary estate it is dependent, or when it is to become an estate in possession—that consistently therewith, Leys may have a present subsisting legal title in possession, not rebutted by the mere production of the government patent dated in 1797, without any proof of actual possession since, or any title under it—that there is nothing in the plea inconsistent with Leys's right to demise, except the traverse or denial of the landlord's title by his tenant—that the plaintiff could not plead *nil habuit* in direct terms, and therefore cannot do so indirectly—that even if the fraud alleged was established, it would not avail the plaintiff, unless he also shewed the want of enjoyment, and that enjoyment is not denied, nor is eviction alleged; wherefore, even if Leys had no title, the plaintiff could not dispute his right to demise, and cited 2 P. & D. 374, *Hall v. Butler*; 10 A. & E. 204, S. C.; 4 U. C. R. 238, *Rudolph v. Bernard*.

Bell, for the plaintiff, contended that the question of fraud was on the evidence, properly left to the jury, who found that the lease was fraudulently obtained, and that the plaintiff did not hold under the defendant—that possession not having been received of Leys, the rule precluding a tenant from disputing his landlord's title does not apply to the cir-

cumstances of this case, which admit of its being disputed, and of the plaintiff shewing that there was no right to demise, no reversion to assign, and that nothing passed to defendant from Leys by the assignment, and that the verdict should be amended according to the opinion of the jury, as expressed in relation to the fifth issue of fact, and cited 1 Sal. 277; Croke, J., 312; 3 Vent. 249, 253; 18 Johnson, 490, Davis v. Taylor, N. York Repts.; 1 Wil. 314; 11 M. & W. 337; Gouldsworth v. Knight, 3. Bing. 474; 6 Taunt. 202; 9 Bing. 613; 10 A. & E. 204; 8 B. & C. 475; 7 A. & E. 447; 4 M. & G. 143.

MACAULAY, C. J.—Upon looking into the Nisi Prius Record, some confusion appears in the way in which the pleas refer to the avowries. The defendant pleaded one plea (the validity of which on demurrer might have been questioned) and three avowries, but the plaintiff treats them as four avowries, and the plea to the first avowry traverses matter not alleged, and thereby raises an immaterial issue. The plea is, that Keyworth did not hold and enjoy, &c. as tenant to Francis Leys, whereas the allegation in the avowry is, that Keyworth held and enjoyed as tenant of the defendant, under a demise by Leys, whose assignee of the reversion the defendant was, &c. The verdict, as noted, does not cover all the issues. There are six issues in fact and one in law, whereas the entry made disposes only of four issues in fact, and leaves the two last unnoticed; and unless amended by the learned judge who tried the cause, a *venire de novo* would seem necessary on that account (a), or a replender might perhaps be ordered, owing to the immaterial issue joined under the only plea to the first avowry. This issue as found—*i. e.*, for the defendant—is inconsistent with, or repugnant to the avowry, which avows that Keyworth held and enjoyed as *tenant of the defendant*, whereas the jury are made to find that he held as tenant to Leys, or at all events they do not find whether he held as tenant to the defendant or not. But this issue being found

(a) 3 T. R. 659; 7 T. R. 52; 1 Doug. 376; 1 B. & P. 329; 7. B. & C. 819; 1 B. & A. 163; 1 Chitty R. 283; 7 T. R. 52; 3 Dow. 211; 4 Bing. N. S. 162; 1 Dow. N. S. 160; 11 A. & E. 186; 1 M. & G. 670, 958; 12 A. & E. 317; 2 Dow. 453; 2 Archbold's Prac., (Chitty) 7 Ed. 1840, p. 1130, b. 4, pt. 1, c. 30, s. 2.

for the defendant, and the first fault in the pleadings being with the plaintiff, against whom it is so found, presents an objection to the grant of a repleader (*a*). Now it is said, a repleader may be awarded by the court, upon a motion for judgment *non obstante veredicto* (*b*); besides which the verdict on this issue is not moved against by either party; the application for judgment *non obstante veredicto* being made by the defendant, in relation to another issue and a separate avowry. Then, as to the rule *nisi* obtained by the defendant's counsel, no leave is reserved and no authority is shewn, warranting the court in reducing the damages to a nominal sum; nor is any sufficient reason given why they should be reduced, if the plaintiff is entitled to recover: nor is there any leave or authority to order a verdict to be entered for the defendant on the last plea of *non tenuit* to the third or last avowry. This could only be regularly done by the learned judge who tried the cause, guided by his notes (*c*). And if so entered under the evidence, the plaintiff might claim that the verdict on the first and second avowries should be entered in his favour, on the issues at present found for the defendant, on the ground that the defendant had only proved one right to distrain, and should therefore be restricted in his recovery to one of the several avowries; and even as it is, had the verdict been complete and suffered to stand, the defendant (irrespective of the second and third avowries) would in strictness be entitled to judgment, and a return of the cattle, &c., on the first avowry, the only issue on that avowry, however repugnant, having been found for him, and the plaintiff not having moved against the verdict. Its being an immaterial issue is not therefore made a ground of objection, even if the plaintiff, with whom rests the first fault, could have raised such an objection. 7 M. & G. 607. No leave or authority appears for the court entering the rent in arrear at 13*l.* 10*s.*, or the value of the cattle distrained and replevied as part of the verdict. It

(*a*) 7 M. & G. 607, *Gordon et al. v. Ellis*: 2 M. & W. 495; 11 M. & W. 236. (*b*.) 5 Dow, 755; 7 M. & W. 612. (*c*) 2 M. & W. 199; 12 A. & E. 317; 11 A. & E. 179.

is too late after the trial, for the defendant to make that prayer; under the statute 17 C. II. ch. 7, sec. 2, it should have been requested at the trial. The rule is reduced, therefore, to the first and last grounds, namely:

1st. Judgment for the defendant, on the issue found for the plaintiff *non obstante*.

2ndly. Setting aside the verdict in toto.

1st. The only issue in fact found for the plaintiff, relates to the second avowry, and, as entered (in the fourth issue), is that the plaintiff was not, at the time when, &c., assignee of Keyworth; probably an immaterial issue. But the notes of the learned judge who tried the cause, shew that the verdict for the plaintiff was intended to have been rendered and entered on the fifth issue in fact, viz., that Leys had no estate, &c.

Of the only issue found for the plaintiff, which is under the sixth plea, being the fourth plea to the second avowry, it may be observed, that it is virtually a plea of *nil habuit*, and that perhaps it might have been demurred to for that reason; but the plaintiff having joined issue, and thereby waived any right to demur or to rely upon any estoppel except in evidence at the trial, it was competent to the plaintiff as against the defendant, who in the second avowry shews himself to be claiming title as assignee of the reversion, to shew that Leys had no reversionary estate, to which the rent was incident, that could be or was assigned, or even that Leys had no estate at all, or any right to demise, unless prevented by some estoppel appearing in evidence, and not waived by the pleadings and issue taken. On this issue the *onus probandi* was on the defendant, to give *prima facie* proof that Leys was seised or possessed of an estate or interest which enabled him to demise to Keyworth for five years, as alleged, or at least which enabled him to demise for some period, however short (*a*).

Proof of a demise, as implying an admitted right to demise, and a reversionary interest (see the judgment upon

(*a*) Finlason's Leading Cases, 148; Note to *Agard v. King*, Cro. El. 775; *Skinner*, 624; Yel. 227; 3 Lev. 193; Cro. Jas. 312.

the demurrer in this cause) might have been sufficient when the plaintiff on this issue as joined might, if not estopped, have rebutted such *primâ facie* case, or legal presumption, by proving the inducement to his special traverse; which inducement according to the rules of pleading, ought in itself to amount to a sufficient answer in substance to the avowry, not by a direct denial, or in the nature of a confession and avoidance, but an argumentative denial, a denial in substance.—Stephens on Pleadings, 196, 207, 212, 217; 2 M. & W. 773; 3 Bing. N. S. 71; 4 A. & E. 666; 8 C. & P. 252.

Now the inducement in this plea contains two material allegations. 1st. Title in Samuel DeRiemer, in which however it is only alleged that he was seised and possessed of the fee in reversion to him, his heirs and assigns, importing an outstanding or prior estate or term, without shewing on what other less estate such reversion was dependent; wherefore such allegation, treated as an intended argumentative denial of Leys's title or right to demise, is open to objection, and might be found insufficient on demurrer, but it has not been excepted to in that way.

2ndly. Fraud by Leys in the alleged demise to Keyworth; but this is only pleaded by way of inducement to the traverse, that he, Leys, had any estate, &c., at the time of the demise, or at any time afterwards, and does not deny, unless argumentatively, the alleged holding and enjoyment by the plaintiff, as assignee of Keyworth, and as tenant to the defendant as assignee of Leys, as alleged in the avowry; and it does not follow, that because Keyworth was induced to become tenant to Leys, by fraud and covin, &c., therefore the plaintiff as his assignee, or as assignee of the residue of the term under which he held and enjoyed, can impeach the demise on those grounds; for Keyworth himself might have been ignorant of the fraud at the time of the assignment, or waived it before assigning to the plaintiff, or been satisfied with the title and lease notwithstanding.

It may be that the two allegations combined, although admitted to be true, did not in law, warrant or sustain the traverse; but that objection is only before us at present so

far as material to the application for judgment *non obstante* (a).

Applying the verdict to the fifth issue in fact, there does not seem sufficient ground for giving the defendant judgment *non obstante*; for if Leys had no estate or right to demise, no reversion or right to distrain could have been acquired by the defendant as his assignee. This point was disposed of, in the opinion expressed upon the demurrer to the fifth plea to this avowry. The defendant did not rely upon the estoppel arising in presumption of law, from the demise alleged therein, and admitted, if not sufficiently repelled by the plea in question; but he took issue upon the traverse of Leys's title. It was held in one judgment on the demurrer, that on the face of the second avowry, a right to demise, and a reversion in fee must be *prima facie* presumed, and be taken to have been implied, though not formally averred. The sixth plea consequently traversed in substance, though not in form, the seisin in Leys, so by intendment implied and averred, and the jury meant to have found against him on that head, for they expressed their opinion that the supposed demise to Keyworth was fraudulent on Leys's part, which it only could have been on the ground that he had no title or legal right to demise, and had nevertheless represented that he had. Notwithstanding this adverse finding, the defendant claims judgment *non obstante*, on the grounds that the plea is virtually a plea of *nil habuit*, and that the avowry, unless avoided, and which is only disputed *sub modo*, estops him from denying Leys's right to demise—in other words, from denying his title or reversionary interest, without shewing how such title or interest had since the demise, ceased or ended; that, although he pleads fraud as respects Keyworth, he does not shew how such fraud affected him as assignee; and that he admits the holding and enjoying alleged in the avowry. But the cases do not appear to me to warrant what the rule asks on this point. It is laid down that judgment *non obstante*, is always upon the merits (b), and never granted unless the plea or rejoinder implies an admission of the plaintiff's title.

(a) 3 Dowl. 472. (b) *Adams v. Jones*, 12 A. & E. 453; *Gwyne v. Burwell*, per Coldridge, J., 6 Bing. N. S. 453.

—Plummer v. Lee (2 M. & W. 495); Negelen v. Mitchell (7 M. & W. 612); Atkinson v. Davies (11 M. & W. 236); Gwynne v. Burwell, 5th proposition (6 Bing. N. S.); Prine v. Grazebrook, (2 C. B. 429); 10 Jur. 250, S. C.; 3 D. & L. 454, S. C.) Per Tindal, C. J.—“The plaintiff is never entitled to such judgment upon the ground of the insufficiency of the defendant’s pleading, when such plea or rejoinder, if found for the defendant and against the plaintiff, unless the plea of rejoinder implies an admission of the plaintiff’s title, which a traverse by the defendant never does, unless such traverse be clearly immaterial.” (a) He also said, “the judgment *non obstante* appeared to be only one species of judgment by confession, when the plea confessed a right of action, but set up an avoidance bad in substance, which could not hold good as to a material traverse, whether of a whole or a part only of the plea.” Now, a title or estate in Leys in reversion, was essential to enable him to confer a right to distrain on the defendant; and admitting that the effect of the traverse was merely to deny that he had any estate—which would be met by proof that he had some estate; however limited, entitling him to grant a demise, as already observed—still the object and intention of the traverse, however informal, was to deny, not only any estate, but any reversionary interest; and though it admits a demise *sub modo*—that is, so far as by not denying it, or otherwise controverting it, than as involved in the denial of any title in Leys, and the allegation of fraud on his part in inducing Keyworth to accept it—still the plea seems to come clearly within the cases, as one upon which, being found for the plaintiff, the defendant cannot have judgment *non obstante*. It is also said that a defendant cannot move for judgment *non obstante* (b) upon a verdict found against him, the course suggested being to move in arrest of judgment; but perhaps a defendant and avowant in replevin would in this, as in some other respects, be regarded as a plaintiff. However, the first part of the rule ceases to be of moment, since, owing to the incompleteness

(a) 7 M. & W. 612; 7 Jur. 423; Hitchcock v. Humphreys, 6 Scott, N. S. 540; 5 M. & G. 560, S. C. (b) Band v. Vaughan, 1 Hodg. 173; 1 Bing. N. S. 767; 1 Scott, 670, S. C.

of the verdict, and the state of the pleadings, the court deem it proper to grant the last part of the rule.

2nd. To set aside the verdict. Applied to the 4th issue as joined, the verdict for the plaintiff should be set aside, as inadvertently so entered contrary to the intention of the jury; and if thus applied, no verdict at all could appear to the fifth issue in fact, or to the 6th or last issue, which is the only one that relates to the last avowry.

Previous to another trial, it may be advisable for both parties to amend the pleadings; for a single avowry under the statute and the plea of *non tenuit*, would admit of the whole case being gone into in evidence at the trial—at least I am disposed to think so. That the tenant may shew the want of a reversion, or dispute the derivative title of the assignee thereof, under the plea of *non tenuit* to an avowry under the statute, see the following cases:—Rogers v. Pitcher (6 Taunt. 202); Bulpit v. Clarke (1 N. R. 56, 62); Hopcraft v. Keys (9 Bing. 613); Gregory v. Doidge et al. (3 Bing. 474); Philpott v. Dobbinson (6 Bing. 104; 3 M. & P. 320, S. C.); Roberts v. Snell (1 M. & G. 577; Hall v. Butler (10 A. & E. 204); Owen v. DeBeauvoir (11 Jur. 458; 16 M. & W. S. C. 547). It may therefore be made a part of the rule, which will be to set aside the verdict, and for a new trial without costs. The parties, nevertheless, will of course exercise their own discretion, and act as they may be advised.

Since, however, the cause has been fully argued upon the evidence, it may be proper to make a few remarks touching its probable effect. This may be more conveniently done by referring to the last avowry, which is general under the statute 11 Geo. III. c. 19, s. 22, and to which *non tenuit* alone is pleaded. On this issue the *onus probandi* is on the defendant, to prove that the plaintiff held and enjoyed the land in question as tenant of the defendant under a demise thereof, at a yearly rent of 4*l.* 10*s.*, for the arrears of which he was, as his landlord, entitled to distrain. The only evidence of a demise is the instrument in writing, signed by Keyworth, and dated the 16th November, 1843, by which he agreed with Leys to rent that part of the lot which he (Keyworth) then occupied, for five years from the

1st of January then next, and for which he was to pay the said Leys the yearly rent of 4*l.* 10*s.*, &c. This may be said impliedly to admit said Leys's right to demise on the 1st of January following; but it was in itself no demise; Leys is not a party to it; he did not sign it; no interest in a future term—no *interesse termini* was thereby created; Keyworth was already in possession, how or under whom not appearing; and nothing further was done; no lease was ever executed by Leys, and no rent is proved to have been paid either by Keyworth or the plaintiff; this instrument was at best but an agreement on Keyworth's part to rent or to accept a lease of the premises from Leys for five years from the 1st of January, 1844, at the rent of 4*l.* 10*s.* per annum. Had Leys tendered a lease, and Keyworth refused to execute it, and an action been brought by Leys against him for not accepting it—that is, for not renting the premises—the validity of the instrument, and its binding effect on Keyworth, in the absence of anything in writing from or binding upon Leys, to give a lease—in short the want of any consideration would arise, and no consideration would appear, unless a promise to grant such a lease could be inferred in the absence of his signature, or of anything in writing to meet the exigencies of the Statute of Frauds, as being an agreement relating to an interest in lands—in other words, for a lease to exceed three years.

The case of *Cardwell v. Lucas*, (2 M. & W. 111) is material on this point. It was there held that where an instrument in writing, purporting to be an indenture of demise for eleven years from a day already past, was executed by the tenant only, who afterwards entered by permission and consent of the supposed landlord, he was only tenant at will upon an implied parol demise (a).

In *Rose v. Poulton* (2 B. & Adol. 822), Lord Tenterden, C. J., says: "In the case of a lease not executed by the lessor, the consideration fails, because in default of such execution there is no lease." Patterson J. distinguishes between covenants and other cases, and those in which a lease was in contemplation, and where in consequence of

(a) Yel. 18, *Soprani v. Skurro*.

the non-execution, the relation of landlord and tenant never was created; in that case, the tenant entered under the alleged lessor, and though not expressly averred, the reasonable inference is, that he had not only held and enjoyed for several years, but had paid rent.

In *Gore v. Lloyd* (12 M. & W. 463), the agreement in writing was signed by both parties; at page 479, Alderson B. says: "when indeed by an agreement of this sort, one person agrees to take certain premises at a certain rent for a certain time, and both parties sign the paper; looking at the whole of such an instrument together, nobody can doubt that though it contains no words of demise by the party who signed it as landlord, such an instrument would amount to a lease, because you cannot give effect to the signature, unless by supposing that there is an implied agreement to demise, besides the express words by which the tenant agrees to take." But the instrument in that case, owing to its peculiar terms, was held not to be a demise, although it was decided that there was a demise afterwards by reason of the occupation of the tenant, coupled with the other circumstances. To create a term for five years, the Statute of Frauds (29 Car. II., ch. 3, sec. 2), requires that the lease should be in writing, and to create a lease in writing, it should be signed by the lessor.

Then, adverting to Keyworth's possession before and after the 1st January, 1844: there is nothing to shew that Leys was ever possessed, or that Keyworth entered or held under him. How long he continued to occupy, after the 1st of January, 1844, before he relinquished his possession to the plaintiff or his father, whether for a year or more, does not distinctly appear. According to the evidence, he remained upwards of a year, and the possession was probably changed in 1845, and though the plaintiff seems to have entered under, or in succession to his father, who had purchased from and entered under Keyworth; there was no proof that Keyworth assigned to the plaintiff or his father any supposed demise from Leys, otherwise than as it can be presumed in law, from the fact of their having succeeded Keyworth in the possession, subsequent to the 1st of January, 1844.

None of them received any lease from, or paid any rent to Leys. It would appear, therefore, that Keyworth being already independently in possession, did not enter or continue to hold under Leys, nor did he otherwise than by signing the writing of the 16th of November, 1843, acknowledge his title or right to demise or create the relation of landlord and tenant, nor did the plaintiff or his father compromise himself with Leys, otherwise than by obtaining the possession from Keyworth; consequently when Leys, on the 19th of November, 1845, executed the deed of conveyance to the defendant, there was no term for five years subsisting, nor even a yearly tenancy, which would be sufficient under the last general avowry, unless it could be held to have been created by the mere circumstance of Keyworth having remained in possession from the 16th of November, 1843, until succeeded by the plaintiff or his father, one of whom was in possession in November, 1845, but so in possession, if not claiming adversely, certainly not acquiescing in Leys' right to the estate, or having recognized him as their landlord. Under such circumstances the doctrine of estoppel would not apply to either Keyworth or the plaintiff, to preclude them from shewing the want of any right to demise, or the want of any legal estate or interest in Leys, even as against Leys himself, and *a fortiori* as against the defendant, his assignee. Adverting again to the judgment on the demurrer, it seems that a tenant, even though there be an actual demise in writing, or by parol, who is not estopped by deed indented or sealed by both parties, or at least by the tenant, or estopped by act *in pais*, as by entry or enjoyment, may dispute the landlord's right to demise; and in the present case there being no indenture or deed, no previous possession in Leys, no entry under or payment of rent to him, and no proof otherwise of his being entitled, it would follow that the plaintiff, on this ground, is not prevented from contesting his right to demise, or from shewing that he had no estate or interest, in reversion, to which the rent (even if otherwise due, as upon a contract express or implied) was incident, and that therefore no right to distrain passed to the defendant.

This leads to the second great difficulty under which the defendant labours ; for, claiming only as assignee of Leys, it was incumbent upon him to establish a privity with the plaintiff, as having entered under Keyworth, by proving that Leys was possessed or seised of a reversion, to which the rent distrained for was incident, and that such reversion had been duly transferred to himself. If a demise for years at a yearly rent of 4*l.* 10*s.* had been established in evidence as between Leys and Keyworth, it might be said upon the authority of the judgment upon the demurrer, that such demise imported a reversion in fee, which the tenant and his assignees were estopped from denying; and that although no assignment to the plaintiff was shewn in writing, or by operation of law, as required by the Statute of Frauds, it might be presumed or inferred that the lease had been duly assigned, owing to the plaintiff having entered under Keyworth, during the demise or term.—4 U. C. R. 238 ; Rudolph v. Bernard, et al. ; 6 B. & C. 41 ; Doe ex dem. of Morris v. Williams ; 2 C. & J. 71 ; 1 Bing. N. S., 45, Cooper v. Blandy ; Roscoe's Evidence, 412.

Still, taking the facts as they appeared at the trial, or even conceding that the writing itself, or combined with the continuance in possession by Keyworth, for upwards of a year, after the 1st of January, 1844, and by the plaintiff and his father afterwards, and until the time, when, &c., amounted to sufficient *prima facie* evidence of a demise from year to year, at the annual rent of 4*l.* 10*s.*, not only as against Keyworth, but also as against the plaintiff as his assignee, the question would arise, whether it was not competent to the plaintiff to rebut any *prima facie* case evinced by these circumstances. In this view the *onus probandi* would be upon the plaintiff, and Leys and the defendant claiming under him, would have the benefit of a *prima facie* right to demise, and a reversion accordingly presumed in their favour. Considering the way in which Keyworth was induced to sign the paper of the 16th November, 1843, it is not probable that he would be estopped from shewing, not only that Leys had not demised, but that he had no right to demise—1 Ld. Raymond, 746, Chettle v. Pound ; 1 Sal.

2767 ; Cro. Jas. 312 ; Yel. 227, Gill v. Glass ; 3 Lev. 193, Aylett v. Williams ; 1 Wil. 314, Lewis v. Willis ; 2 Wil. 143, Brudenell v. Roberts ; 2 Vent. 153, Harris v. Parke ; 1 B. & P., 326, Williams v. Bartholomew ; 10 East. 350, Hodson v. Sharpe ; 6 Taunt. 202, 1 Mar. 54 ; Rogers v. Pitcher ; 1 B. & B. 531, Carvick v. Blaggrave ; 1 Bing. 38, Gravenor v. Woodhouse ; 2 Taunt. 278, Taylor v. Needham ; 2 Star. N. P. C. 230, Doe ex d. Lowden v. Watson ; 2 Bing. 10, 3 Bing. 474, Gregory v. Doidge ; Holt N. P. C. 489, Parry v. House et al. ; 1 Bing. 45, Cooper v. Blandy ; 3 Bing. N. S. 572, Brooke v. Biggs ; 5 B. & C. 433, Phillips v. Pearce ; 8 B. & C. 471, 1 M. & R. 703, Cornish v. Searell ; 7 A. & E. 447, Doe ex dem. Plevin v. Brown ; 11 A. & E. 307, Doe ex dem. Higgenbotham v. Barton et al. ; 2 M. & Rob. 57, Doe Harvey v. Francis ; 4 M. & W. 331, (S. C. in error) 4 M. & G. 142, Claridge v. McKenzie ; 1 Car. & M. 78, Agar v. Young ; 15 M. & W. 224, Sturgeon v. Wingfield ; 1 Taylor's Evid. 89 ; 3 Stephens N. P. 2501 ; Addison on Contract, 694.

If Keyworth (had he continued in possession) would not have been estopped, neither would the plaintiff, unless it had further appeared that he had recognized the alleged demise from Leys, and entered as assignee under it, as if Keyworth had received a written lease, and assigned it in writing to the plaintiff, and he had afterwards entered under it ; for in such an event however, Keyworth not having entered under Leys, might have disputed his right, on the ground of his having been induced to accept the lease by fraud or misrepresentation, such objection would not lie in the plaintiff's mouth, if he had adopted, entered, and enjoyed under it, without disturbance or eviction, especially in the absence of any previous disclaimer or repudiation on Keyworth's part, who might all along have been satisfied with the lessor's title, and assigned to the plaintiff only the residue of his term, under such lessors. But it does not appear that the plaintiff is the assignee of Keyworth in any such manner and form, or that he is the assignee of any interest or term for years, except only so far as it can be presumed from the fact of his having received possession from Key-

worth, and so entered in privity under him. To give effect, however, to such a presumption, a subsisting demise of the description alleged, between Leys and Keyworth, must be supposed, and considering the way in which the plaintiff seems to have succeeded to the possession, not as the assignee of a lease from Leys, but as assignee of Keyworth's possession in general terms, without any special reference to Leys or to his claim, to be regarded as landlord and reversioner, it is not probable that the plaintiff would be estopped, any more than Keyworth himself would have been, had the possession remained unchanged; I am disposed to think not.

It may also be suggested, that in contesting or denying merely a reversionary interest, a right to demise, and a demise as alleged, are conceded, and that the evidence or proof must be consistent therewith, as that the landlord was himself only a termor, whose term had ended since the demise, or that he had since the demise assigned or parted with his estate, otherwise than to the avowant; but that when the right to demise is disputed, on the ground of fraud or mistake, the existence of any demise is virtually denied, and if there were no demise there could be no reversion expectant upon its determination. Fraud vitiates everything, and would defeat or avoid the lease *ab initio*; so the circumstances of such cases as 6 Taunt. 202, Rogers v. Pitcher; 1 Bing. 38, Gravenor v. Woodhouse, 8 B. & C. 475, Cornish v. Searell; 3 Bing. 474, Gregory v. Doidge; go to repel the inference of any demise, by reason of attornment or payment of rent, to rebut the relation of landlord and tenant, or any presumed privity as arising therefrom, by neutralising or destroying the effect of what had been done in acknowledgment of the paramount right, and which, unexplained, would have constituted a sufficient *prima facie* case in support of such right, and this not so much on the ground of fraud, but rather of misapprehension, inadvertence or mistake, and the absence of anything concluding or estopping the tenant from shewing the truth as a sealed lease, or actual entry under the alleged landlord. I am much disposed to think that the present falls within the

class of cases last mentioned, and that under the circumstances of the respective parties, as in evidence, it is open to the plaintiff to shew that Leys had no right or title to demise, and that therefore there was no valid demise or reversion. What I understand the plaintiff's counsel to contend for as evidence of legal fraud is, that Leys never having been himself possessed, but finding Keyworth in possession, did not frankly state to him the nature of his title, or relate to him the circumstances under which he had purchased, with the reservation made in his favour respecting the terms of payment, evincing on the face of them a distrust of the title, and guarding against its defects, but that he in round terms asserted himself to be the owner, suppressing or withholding what really constituted a cloud upon his alleged right; and that Keyworth, crediting and relying on the correctness of such assurance, thus positively made, was thereby induced to sign the writing of the 16th of November, 1843; in short, that Keyworth was not made acquainted with all the material facts attending Leys's pretensions, but was led to suppose that Leys was really the undoubted owner, and to treat with him accordingly, whereas it turned out that Leys's title was not clear, either as respected the heirship of the person who was said to have conveyed to him (for no conveyance was proved), or the means of proving such heirship, which was not proved. But without imputing to Leys any fraudulent or improper motive or design, and although Keyworth does not appear to have asserted or claimed any title in himself, (a) I am disposed to think the plaintiff is in a position to require on the defendant's part *prima facie* proof of title or right to demise in Leys, that there was a demise, a reversion and an assignment thereof, and on his own part to rebut any part of such *prima facie* case by counter proof. And that, even admitting Leys's title of which there is no proof beyond the mere presumption, as against Keyworth and the plaintiff, arising from the writing of the 16th of November, 1843, such writing did not constitute a demise in

itself (a) and that a yearly tenancy at a fixed rent was not otherwise proved or reasonably to be inferred from the evidence.

Without therefore anticipating the effect of further evidence or future argument and consideration, should the defendant persevere in the case, the foregoing observations will shew how very questionable it is, whether Leys ever leased to Keyworth, or whether any demise at a yearly rent as alleged in the last avowry, ever existed, either as between Leys and Keyworth, or the defendant and Keyworth, or the defendant and the plaintiff, and whether at all events it is not open to the plaintiffs to contest, as against the defendant Leys's title or right to demise, and to shew that no legal reversionary interest under which the distress can be sustained, passed from Leys to the defendant, by the deed of the 19th of November, 1845.

McLEAN, J.—The defendant in this case has moved for judgment *non obstante veredicto*, a verdict having been found for the plaintiff on an issue, which at the trial and up to the time of the argument of the motion now before the court, was considered to involve the question of fraud in Francis Leys, in inducing the plaintiff to accept a lease from him. On reference, however, to the record, it is found that the plaintiff has pleaded as if there were four avowries, and that the defendant has treated the pleas as answers to four avowries, when in fact there are only three avowries and a plea, which is treated as the first avowry. Under these circumstances, and two of the issues in fact taken on the avowries remaining wholly undisposed of, owing as it appears to the confused state of the pleadings on the record, the learned judge cannot adjust the verdict, and enter the finding of the jury on those issues to which they were intended to apply. In the consideration of the demurrer to one of plaintiff's pleas, in which judgment was rendered at the commencement of the last term, I satisfied myself that the plaintiff, not having received the possession of the premises from the defendant or Leys, could dispute the reversionary estate of the defendant and his right to dis-

(a) McLean v. Young, 1 U. C. C. P. R. 62.

train, which, of course, depended on the existence of a reversionary estate in the defendant. The only instrument on which defendant relied to establish a demise from Leys to Keyworth, in fact, does not shew a demise, and cannot therefore shew a reversion in Leys. It is only signed by Keyworth, and amounts to an agreement to take a demise. If Leys had in fact a good title, he might, notwithstanding that instrument, have dispossessed Keyworth; and if, relying on such title as he had, Leys had brought ejectment on Keyworth subsequently, declining to take a demise, Keyworth could not be estopped from shewing that in fact Leys had no right to demise, and that therefore his acknowledgment of Leys's right to demise, under a mistake as to his title, could not operate as an estoppel. I concur fully in the view taken by the Chief Justice, and feel that justice to the parties requires that the cause may be sent down again for trial, when the errors in pleading and the errors on the record may be amended, and the issues be simplified, and the whole question may be disposed of more satisfactorily.

SULLIVAN, J.—This case was tried before me at the last Toronto Assizes, upon the following pleadings:

The plaintiff declared in replevin, for a taking upon a certain close called lot 29, in the third concession of the township of Vaughan.

The defendant pleads, denying the taking, except upon a part of the lot, a certain 90 acres; he concluded to the country, and upon this the first issue in fact is joined.

The defendant then avows, upon a tenancy of one John Keyworth to him the defendant, under a lease in writing made to him by one Francis Leys, of whom the defendant was the assignee, of all his estate and interest, before and during the time of the rent accruing.

The plaintiff pleads to this avowry, calling it the second avowry, that the said John Keyworth did not hold as tenant thereof to the said *Francis Leys*, under the said supposed demise, concluding to the country; upon this arises the second issue in fact.

The defendant then avows, secondly, upon a tenancy of

the plaintiff, under and by virtue of a certain demise in writing, made by Francis Leys to John Keyworth, averring that defendant was assignee of all the estate and interest of Leys, and the plaintiff of all the estate and interest of Keyworth, before and during the time of the rent accruing.

The plaintiff pleads to this avowry, calling it the third avowry:—1. *Non tenuit*, under the said supposed demise. 2. That the plaintiff was not the assignee of Keyworth. 3. A plea demurred to. 4. That one Samuel DeReimer, at the time of the said supposed demise, was seised and possessed of the fee simple of the land, &c., in reversion to him, his heirs and assigns, for ever; and that Keyworth was induced to become tenant of the said premises to the said Francis Leys, by the fraud, covin, and misrepresentation of the said Francis Leys, and others in collusion with him—*without this*, that the said Francis Leys, at the time of the demise, had any estate or interest in the land; the plea concludes to the country. Upon the first plea to this avowry, the third issue in fact is taken; upon the second, the fourth issue; upon the fourth, the fifth issue.

The plaintiff then avows, thirdly, under the statute 11 Geo. II., not specifying the demise or the assignments; the defendant pleads, calling it the fourth avowry, *non tenuit*—upon which the sixth issue in fact is taken.

In consequence of the number of issues, the confusion created by the pleas miscalling the avowries, and by the first plea being designated as an avowry, and by the want of marginal notes, I was induced to save the time which would have been required to read over all the record, and to make an abstract of the pleadings for myself, by taking from the counsel their account of the matters to be tried. On the first issue there was no difficulty, and I directed the jury to find for the defendant on the second issue, which is upon a plea which was probably intended for *non tenuit*, but which, in truth, traverses nothing alleged by the avowry, it merely denying that Keyworth held *under Leys* by virtue of the said supposed demise, not denying the holding under the defendant, and which issue is therefore immaterial, as well as upon the plea of *non tenuit*; to the second avowry

(calling it the third), the question which the counsel submitted was the fact of a demise, and the instrument just read by the Chief Justice, signed by Keyworth alone, being produced and proved without objection as a demise, I directed the jury to find for the defendant. I did not discover that there were three pleas of *non tenuit*, the second being apparently pleaded to the third avowry. I did not look for any more, and had no marginal note, or information from counsel, to call my attention to the third issue on *non tenuit*, pleaded nominally to a fourth avowry—thus one of the issues was lost sight of; the question submitted to the jury, lease or no lease, would have affected them all equally. I was much embarrassed as to how the plea to the second avowry, concluding with a traverse of title in the lessor, should be dealt with. I thought at the trial it was bad, as being a plea of *nil habuit*, and that it should have been demurred to; but as issue was taken upon it, I conceived that in evidence the lease was proof of the lessor's title to demise, and conclusive proof, unless the fraud stated in the inducement, by avoiding the demise, left it open to the plaintiff to dispute the lessor's title, and to put him to the proof of it; and as the lease was the only proof adduced of the lessor's title, I left what appeared to me and to the counsel on both sides as the only question to be tried on this issue, whether the demise was fraudulent. I was not asked to leave this question of fraud, or the fact that the original tenant was not put in possession by the lessor, to the jury, as affecting the issues on the pleas of *non tenuit*. The jury, contrary to my impression of the evidence, found the fraud, probably from having heard of the evidence adduced at a former assizes affecting the same title, and from the former trial being vehemently, though irregularly alluded to by the plaintiff's counsel; the issue in this special plea was therefore found for the plaintiff. This disposed of the third question submitted. The fourth question was, whether the plaintiff was the assignee of Keyworth. I instructed the jury that if they found that the plaintiff entered under his father, and if his father entered under Keyworth, and not as claiming title in themselves or as wrong-doers, they might find the issue for the defendant—which they did.

In taking the verdict and applying it to enumerated issues, it was manifestly impossible, with my misapprehension of the proper numbers, that it could have been taken correctly; and the consequence is, that upon the verdict, as formally entered upon the record, two of the issues in fact appear undisposed of. I might perhaps set this right, as the questions were submitted plainly and found distinctly by the jury, and manifestly would affect all the issues; and the issues to which the findings of the jury were applicable, are equally plain. I do not however see how this could properly be ordered by me, unless I am satisfied that the questions left to the jury were the only ones in truth raised by the pleadings, and that the evidence was sufficient to sustain the findings of the jury. Neither party has applied to me to amend the entry of the verdict; and if I were so applied to, I must say that, under the circumstances, it is not a case in which I would be disposed to interfere.

The plaintiff has not moved to set aside the verdict. The defendant moved for judgment *non obstante veredicto* on all the issues, and failing that, for a new trial: the first part of his rule he has abandoned—the second is now under consideration.

I think there must be a new trial; in the first place, because the issues were not all disposed of by the verdict as taken—Secondly, because the only plea to the first avowry is utterly bad, and the issue found thereon immaterial, for the reasons before mentioned, and to which I need not again allude—Thirdly, because the instrument produced as a demise for five years, was not a demise at all; it is not signed by the lessor; it contains no words or demise, and is a mere agreement to take, without any to let—Fourthly, because I do not agree with the finding of the jury on the question of fraud submitted—Fifthly, because the plaintiff was probably entitled, under the plea of *non tenuit*, and upon proof that the lessee was not put into possession by the lessor, but merely attorned, particularly if the plaintiff can shew that he was not assignee of a term, or supposed term under Leys, to dispute the lessor's title—

Sixthly, because the defendant was only entitled to recover on one avowry.

As to the third of the above points, the case of Cardwell v. Lucas (2 M. & W. 111), is conclusive; there it was held that an indenture, purporting in every respect to be a perfect lease, had not in itself the operation of a demise, so as to leave a reversion expectant upon it, because it was not executed by the intended lessee.—Downes v. Green (12 M. & W. 479), is also in point. It is to be regretted that the plaintiff's counsel did not make the objection at the assizes as a reference to the Statute of Frauds would have shewn me that the instrument produced, not signed by the lessee, and which was the only evidence offered of a demise, could not have supported the first or second avowry, or even the third, without proof of the payment of rent, or of a parol demise, independent of the agreement; in fact, the paper writing produced was a mere agreement to take on the part of the occupier of the land, and there was nothing in it shewing a demise. As regards the fourth reason for setting aside the verdict, I continue of the opinion I expressed at the trial, that there was not evidence in the case to support a verdict imputing fraud to the assignee of the defendant: a weakness of title in a vendor or lessor, particularly when no claim is shewn on the part of a person with better title, and when the existence of such a person is not shewn by evidence, can never in my opinion be taken as proof of fraud. A lessor always asserts title to demise; and if the want of title were in itself a proof of fraud, then the doctrine of estoppel, as between landlord and tenant, would be at an end, and so would the doctrine that a disseisor, or a tenant at will, or a tenant from year to year, may make a lease for years, which is good until eviction by title paramount.

With respect to the fifth objection to the verdict, it is one, which like some of the others, should properly have come from the plaintiff; it should have been submitted upon the plan of *non tenuit*, and not upon the plea containing the imputation of fraud. The latter plea contains no allegation that the plaintiff's assignor Keyworth was not let into

possession by Leys, but was in possession before the demise; it would have required this as well as an averment of ignorance of the true state of the title, and perhaps a denial of the plaintiff being the assignee of the alleged term to have made the defence under that plea good; but if there was a defence to the third avowry, under the plea of *non tenuit*, it is fit to be considered on the present motion. This brings me to the fifth objection to the verdict, which is also one that should have been urged at the trial, and which should have come from the plaintiff.

In the case of *Williams v. Bartholomew* (3 B. & P. 326), the tenant for life, subject to forfeiture, leased to a tenant for a term of years, and apprehending that he had incurred a forfeiture, he acquiesced in the person in remainder receiving rent from the tenant, but his executor was allowed to shew that this acquiescence was under a misapprehension, and to recover rent in an action of covenant. Heath, J., says, "Suppose a lease made, and a person claim as heir-at-law, to whom the rent is paid, an afterwards the true heir is discovered, will it be said that he shall not recover."

In *Rogers v. Pitcher* (6 Taunt. 202), in replevin, a plaintiff who was tenant of a lessor, against whom an elegit was issued, and who attorned, supposing the title under the writ good, and permitted to shew, upon the plea of *non tenuit*, that the attornment was made under a misapprehension, Dallas J., said—"The rule is clear, that generally a tenant cannot dispute his landlord's title; but here it comes to this question—whether after a person has been in possession under another lessor—if he is persuaded to attorn under circumstances which do not warrant it, it may not be open to him to prove that the rent was paid without sufficient ground; and I think it is."

In the case of *Gregory v. Doidge*, 3 Bing. 474, the plaintiff, who had occupied lands under one lessor, upon his death paid a shilling to a person who claimed to be heir to the lessor, as an acknowledgment of his title, but it turning out that the defendant had no claim to the property, it was held that the plaintiff might dispute the defendant's title, on the plea of *non tenuit*, in replevin. In the judg-

ment the doctrine of Buller, J., in *Williams v. Bartholomew*, is quoted: "If the tenant could have proved that his attornment proceeded on the misrepresentation of the remainderman, he might prove that another was alive and entitled," and the case *Turner v. Duploch* (2 Bing. 10) was cited.

In *Cornish v. Searwell* (8 B. & C. 475), the tenant under an indenture of lease, acknowledged himself tenant, or attorned to two sequestrators in Chancery, it was held that without surrender of the lease they had no legal title, and the title of the original lessor continued, and the defendant who was the attorning tenant was at liberty to shew that the sequestrators had no legal title.

Hopcroft v. Keys (9 Bing. 613), was a case of eviction by title paramount, when the evicted tenant entered into an agreement with the rightful owner, and was allowed to dispute the first lessor's title.

Claridge v. McKenzie (4 M. & G. 143), was a case in which a tenant, who derived possession from a lessee of an owner, not knowing that the original term had expired, upon the expiration of his own term, entered into an agreement with, and paid rent to a person who would have been entitled had the first term not expired, the tenant not being aware that the term was at an end, and that a reversionary estate accrued in another, it was held that the tenant not having received possession from the person to whom he agreed to pay and did pay rent, was at liberty to shew title in the reversionary estate in another.

In *Hall v. Butler* (10 A. & E. 204), a person without title made a parol demise, he afterwards stated to his tenant that he had given up the premises to another, with whose title he was satisfied, and that the rent was thenceforward to be paid to him, and the tenant paid part of the next quarter's rent on account. It was held that the tenant as plaintiff in replevin could not set up title in another who demanded rent, but who did not proceed to evict, or shew that the defendant in replevin to whom he had paid rent had no title.

Now it is to be observed, that in all these cases, except *Hall v. Butler*, the tenant was allowed to dispute the title of the person to whom he had allowed or paid rent by mis-

take, because another person in *esse* was by the real position of the reversionary title, in the true place of landlord, and that by title consistent with the demise, and with the legality of the tenant's possession; in none of those cases but *Hall v. Butler*, does the tenant set up a title in a mere stranger, or content himself with the weakness of the title he disputes. In the case of *Hall v. Butler*, the tenant was not put into possession by the one to whom he paid the quarter's rent, but by another, who disclaimed; the person to whom he paid the quarter's rent was therefore his only landlord, or the only one who could claim as entitled to rent as such. But in this case the title of a stranger was not allowed to be set up, and the estoppel created by the payment and receipt of rent was considered in force.

The case of *Hall v. Butler* has, in this respect, much similarity with the present case. If it became admitted that there was a demise in the latter, when there is a pure attornment, there is no necessity for a demise, for a term already exists; the attornment merely changes the acknowledged landlord. In the present case, at the time of the alleged demise there was no term—no relation of landlord and tenant subsisting. If Leys had in fact demised, or if Keyworth or his successor had paid rent to Leys or his assignee, which would have been conclusive evidence of a parol demise, then I am by no means convinced that the plaintiff would not have been estopped, for his mistake is not as to who is the owner of a reversionary estate, but he would have chosen to become the lessee of a claimant, and to create a reversionary estate against himself by estoppel. It is true that the plaintiff, or those under whom he entered, did not originally receive possession from Leys, but then neither he nor they received it, so far as appeared from the person whose estate the defendant desires to set up, or from any of his privies in estate. In the cases above quoted, except *Hall v. Butler*, the derivative portion of the title after the coming of the tenant into possession is disputed, and the title under which he claimed is shewn to have descended to some person other than he to whom the attornment was made, and between whom and the tenant

there would be privity to create an estoppel, if the derivative title were clear. In the present case Samuel DeReimer is not shewn to have anything to do with the plaintiff's title or possession; and I cannot say that it is in the plaintiff's power to set up this title for any purpose, unless by shewing that there was no demise, in which case it is not necessary.

I desire therefore, not to be held as deciding, that a mere wrong-doer in possession of land, who accepts a demise from one who claims the fee, can be permitted to dispute the title of that person, either upon its own weakness, or by proof of title in a stranger. The case does not however turn upon this point, and probably will under no circumstances depend upon it.

On the whole I think the verdict should be set aside and a new trial granted, without costs, and if the case be further prosecuted, I think parties should mutually agree to try whatever questions may arise, under one avowry, under the statute 11 Geo. II., or at most with two general avowries, alleging tenancies respectively in Keyworth and Lynett, and with the plea of *non tenuit* to each. The attempts to avow and plead specially in this case, have led to no good, but on the contrary to much expense, delay and trouble, that might have been avoided.

Per Cur.—Rule absolute to set aside the verdict, and for a new trial without costs.

THE MARMORA FOUNDRY COMPANY V. BOSWELL.

Demurrers to declaration and pleadings, under the statute 1 Wm. IV. chap. 12.

Writ issued 6th April, 1850.—Declaration 4th September, 1850.—Defendant for 37*l.* 10*s.* 0*d.*

1st count states, that on the 1st of November, 1848, the defendant subscribed for ten shares of the capital stock of the plaintiffs, of 12*l.* 10*s.* each; in all, 125*l.*, payable ten per cent. on each share immediately after the first election of directors, and the residue by instalments not exceeding ten per cent, at such periods as the president and directors

should direct and appoint; provided that none of the said last mentioned instalments should be called for, in less than forty days after notice, in the Upper Canada Gazette and two or more newspapers published in the then Midland District; that afterwards 20,000*l.* of the said stock being subscribed, the subscribers called a meeting at the court-house in Belleville, of which notice was published in the Upper Canada Gazette, and two other newspapers printed in the then Midland district, thirty days previous, and at which five directors were elected, who were stockholders, and duly qualified, of which defendant had notice; whereupon ten per cent. on each share of the defendant, amounting to 12*l.* 10*s.*, became due and payable from defendant to plaintiffs, yet defendant did not pay the same, whereby an action hath accrued, &c.

2nd count states, that after such subscription for stock, and the election for directors as aforesaid, &c., the president and directors did—to wit, on the 20th of April, 1849—direct and appoint that an instalment of ten per cent. upon the capital stock of the plaintiffs, so held by defendant as aforesaid, should become due and payable from defendant to plaintiffs on the 15th of June then next, at the office of the Montreal Bank at Belleville, of which call public notice was given in the Upper Canada Gazette and in the Chronicle and Argus, two newspapers published in the then Midland district, and in the Intelligencer and Victoria Chronicle, two newspapers published in the then Victoria district, forty days before the day for payment. That such instalments thereby became due and payable from defendant to plaintiffs; yet defendant did not pay, whereby, &c.

3rd count states similar to the second for another instalment, laying this call on a different day, and a different day for payment thereof.

Demurrer to 1st, 2nd, and 3rd counts.

To 1st count: grounds specially assigned.

1st. Not alleged that books of subscription were opened within two months after the passing of the act.

2nd. Not alleged that notice of the meeting to elect directors was published according to the statute; the news-

papers not alleged to have been published in the Midland and Victoria Districts.

3rd. Not shewn that the persons chosen directors were duly qualified.

4th. Not alleged that a deposit of 1000*l.* was paid in.

5th. Or that plaintiffs had commenced business before suit.

6th. That plaintiffs cannot sue for calls.

To 2nd and 3rd counts separately—

1st. That the call alleged was only partially upon defendant's stock, and not generally on the whole stock subscribed.

2nd. Not alleged that the directors were duly qualified.

3rd. Not alleged that a deposit of 1000*l.* was paid in.

4th. Or that plaintiffs had commenced business before suit.

5th. Plaintiffs not entitled to sue for calls.

The plaintiffs joined in demurrer.

The same plaintiffs	}	The pleadings are similar.
v. BEATTY.		

The same plaintiffs	}	The declaration is similar to the above.
v. RUTTAN.		

6th plea to the 1st count: That no books of subscription were opened within two months after the passing of the act—Verification.

10th plea to 1st count: That by reason of defendant's non-payment of said instalment, and his neglect and refusal to pay, the said shares became, and were by the act forfeited—Verification.

12th plea to 2nd and 3rd counts: That public notice of the calls in those several counts mentioned, was not duly given as in those counts alleged—To the country.

Demurrer to 6th, 10th, and 12th pleas, special causes assigned.

To 6th plea—1st. That it amounts to never indebted, and should be so pleaded.

2nd. That it is confession and avoidance, and does not confess any indebtedness, nor does it traverse, except that it argumentatively denies the alleged indebtedness.

3rd. The opening of books within two months not a condition precedent.

4th But the statute on that head is only directory.

5th. Argumentatively denies that plaintiffs are a corporation, and should be in abatement.

6th. Does not go to the merits of the action, only denies plaintiffs' corporate existence.

To 10th plea. That it is matter of law arising on the face of the declaration.

2nd. Is in confession and avoidance, and yet contains no new matter, but only matter of law drawn from the facts stated in second count.

3rd. Does not shew a forfeiture.

4th. Does not shew any action of directors to forfeit.

5th. Does not shew forfeiture without assent of plaintiffs.

To 12th plea—1st. That it traverses too much, is too wide, denying the giving notice of the calls in both counts mentioned, without traversing as to each disjunctively.

2nd. Tries to compel plaintiff to prove the notice as to both calls jointly.

3rd. Alleging payment because it may be true, and yet plaintiffs entitled to recover one or other of the calls.

4th. Amounts to never indebted, which should have been pleaded.

MACAULAY, C. J.—The first objection, in point of order, is that the plaintiffs cannot maintain the action at all.

Reference was made to the statutes 9 Vic. ch. 80, secs. 28 & 29, and 10 & 11 Vic. ch. 87, relating to the Cobourg Railroad Company, as evincing the opinion of the legislature, that, without express authority, trading corporations cannot sue for instalments or calls on stock subscribed: but on comparing the 4 W. IV. ch. 28, secs. 17 & 18, and 9 Vic. ch. 80, secs. 28 & 29, with the 1 W. IV. ch. 12, secs. 4 & 5 it will be perceived that they are differently worded; the two first mentioned acts, in secs. 17 & 28, providing only that, as soon as directors were appointed, it should and might be lawful for them to call upon the stockholders of the company, by giving thirty days' notice, &c., for an instalment of ten per cent. on each share, and the residue as

therein specified. The 18th and 29th sections relate to forfeitures of stock in the event of default of payment. Thus framed, they might require the aid of the 10th and 11th Vic. ch. 87, to enable the company to enforce payment by action, according to the recital: and section 7, and the saving at the end of this section, shews that a right to sue may co-exist with a right to enforce forfeitures, under the 29th section of the 4th Wm. IV. ch. 28. However, the adoption of one course might operate as a waiver of the other.

But the 4th section of the act under which the plaintiffs are suing enacts, that the amount of shares subscribed shall be due and payable to the company as therein provided; and the defendant's counsel has not convinced us that, for instalments expressly made due and payable to the company, the plaintiffs cannot sue under the powers conferred by the 1st section of the statute; and we therefore adhere to the opinion already expressed on this head, in the case of the present plaintiffs v. Ponton.—13 East. 8; 1 Bing. N. S. 399, Bedford et al. v. Brutton et al.; 6 Moore, 199, Andrews v. Ellison et al.; Chitty, jr., Forms, 480 (e).

2ndly. As to the want of an averment that books were opened within two months no concise mode or form of declaring is provided for in the 1 Wm. IV. c. 12, as in the 8th section of the 10 & 11 Vic. ch. 87, and many recent statutes, creating trading corporations of various kinds; and the brevity thereby authorised cannot be regarded as settled precedents that may be adopted in other cases.

Still such provisions indicate the disposition of the legislature to obviate technical niceties in proceedings of this kind; and although, whatever is conditional to the plaintiff's right to sue must notwithstanding be stated by them, we still think the opening of books within two months not a condition precedent, requiring to be averred; and regard that part of the statute as directory only, independent of the argument of the defendant's being estopped by having subscribed in the books, at whatever time they may have been opened.

3rdly. The notice of the election of directors is alleged to have been published in the words of the statute, section 7; that is, published in newspapers printed at the places stated. If such papers were merely printed and not published, it would follow that the notice was not published, as therein averred; but its publication is not denied; and if published in such papers printed at those places, it seems to us sufficient, even if printing does not import publication. As to which see *Baldwin v. Elphinstone* (2 W. B. 1037).

4thly. We do not think the deposit of 1000*l.* a condition precedent to the plaintiff's right to sue for calls. It was so intimated in the case of the plaintiffs *v.* Murney.—*Davidson v. Gill* (1 East. 72).

5thly. If all or any of the persons elected directors were not duly qualified, there was a mode by which their election might be set aside; but it being alleged that five stockholders, duly qualified, were elected, they were directors *de facto*; and we do not think it a valid defence to this action that some one or all of them may not have possessed the requisite number of shares or been otherwise not duly qualified. It would not be a good defence if pleaded in denial; and so far as it is material to aver due qualification, we think it is sufficiently done, although it is not expressly averred that each director held stock to the extent of ten shares. At all events, if the allegation is not sufficient, the defect is not pointed out in the cause of special demurrer assigned. It is not stated that the plaintiffs have averred that each stockholder was a subscriber to the number of ten shares, if that is the objection intended; the cause assigned is, that it is not alleged or shewn that the persons so chosen to be directors were duly qualified as stockholders, in accordance with the act; whereas it is alleged that the stockholders did duly elect five directors, who were at the time of their election stockholders in the said company, and duly qualified according to law to be elected directors. If anything more specific should have been added, the omission is not pointed out.—*The Company of the Norwich and Lowestoft Navigation v. Theobald* (M. & M. 151).

The case cited of *Preston v. Guyon* (10 L. J. N. S. pt. 3, p. 73), was in Chancery.

The averment is made according to the usual forms in the books of precedents, and is not inconsistent with the call having been general on all the stockholders. The act does not say the calls shall be general, though probably so intended, and it possibly may be that all the stockholders except the defendant have already paid the instalment mentioned; or that in the publication of calls, schedules may have been published in which the stockholders and their respective shares were specially named and mentioned.

If due publication was denied, the onus would be on the plaintiffs to prove the calls duly made on the defendant; and if it appeared they were partial, calling only upon him individually and omitting the other stockholders, it might be insufficient to support the averment as made. But I think the averment itself sufficient in substance and form, whatever proof might be necessary to establish it. The *Sheffield Railway Company v. Woodcock* (7 M. & W. 384), Parke, B.; see *South-Eastern Railway Company v. Banner* A. & E. 497).

1st plea, the argument of Cowling and rejection of the plea. 5 Railway Cases, 275; *Ex. Newry and Enniskillen Railway Company v. Edmunds*, and 2 Ex. R. 118, S. C.—not a condition precedent under 8 & 9 Vic. ch. 16; and that the same application should be made to each shareholder for the same portion of the sum originally subscribed.

This disposes of the cases against Boswell and Beatty.

As to the case against Ruttan. The 6th plea is disposed of above, No. 2. The 10th plea is clearly bad. It does not deny any fact alleged, or state any new fact, but merely invites the reference of a point of law to the jury, as an issue to be tried.

As to the 12th plea, the first, second, and third grounds may be taken together. The case of 13 M. & W. 30, 1 D. & L. 969, same case, shew that the plea is distributive and not too large. (See also 2 C. & J. 498; 1 Dow. 572; 3 A. & E. 741; *Vivian v. Jenkins et al.* 10 M. & W. 634; *Eden v. Turtle*, 4 U. C. Q. B. R. 207; 5 U. C. Q. B. R. 575.)

The fourth is the main point. The act, sec. 4, does not require the notice of calls to be published in four newspapers, as averred; but in two or more, published in the then Midland District. No objection, however, has been made on this head, and the reason of the double averment is obvious. The substance of it is that the calls were duly published according to the requirements of the statute. The principal question is, whether this plea is bad, as amounting to or traversing what would be put in issue by the general plea of never indebted. The statute 1 Wm. IV. ch. 12, sec. 4, enacts that the amount of any shares subscribed for shall be due and payable to the plaintiffs in the manner following: ten per cent. on each share subscribed shall be payable to the company immediately after the stockholders shall have elected the number of directors thereafter mentioned, and the remainder by instalments of not more than ten per cent., at such period as the president and directors shall from time to time direct and appoint for the payment thereof: Provided always, that no instalment shall be called for in less than forty days after public notice shall have been given in the Upper Canada Gazette, and in some two or more newspapers published in the Midland District. We have held that for such calls, when duly made, an action of debt will lie under the statute. But whether the obligation is to be regarded in the light of a mere simple contract, is not a settled point. In the *Edinburgh Railway Company v. Hibbleswhite* (6 M. & W. 713), Lord Abinger said—"This is an action of debt founded on the original contract between the parties—namely, to pay upon the calls being duly made. The clause which gives the form of declaration proceeds upon the contract between the parties." Is not this therefore debt on simple contract? (See also 8 Dow. 802 S. C.) But afterwards in giving judgment, he seems to have expressed a different opinion; for after saying that the declaration was bad at common law, and that to make it good the act of parliament must be referred to, he said, the case then falls within the fourth rule, which requires the defendant in actions of debt, other than simple contract, to deny some particular fact alleged in the decla-

ration. Our own rule (E. T. 5 Vic.) Cameron's rules, p. 56, No. 3, is similar to that referred to by Lord Abinger. After abolishing the plea of *nil debet*, it provides that in actions of debt on simple contract (other than on bills of exchange and on promissory notes) that the defendant may plead that he never was indebted in manner and form as in the declaration alleged, and that such plea shall have the same operation as the plea of non assumpsit, which (p. 53) operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. It also provides, that in other actions of debt in which the plea of *nil debet* had been previously allowed (including those on bills of exchange and promissory notes), the defendant shall deny specially some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. The declaration in the present case, though framed in debt, does not anywhere expressly allege that the defendant was indebted to the plaintiffs, as is done in ordinary actions of debt on simple contract and in declarations for calls, as authorized by the statutes in England, and to which the plea of never indebted is therefore peculiarly applicable. But it states a series of facts, whereby, as a legal consequence, the defendant became indebted by act of parliament, as expressed by Tindal, C. J., in 6 Bing. N. S. 136-7.

It is in this view questionable whether the plea of never indebted be admissible without infringing on the new rules above mentioned; and if not admissible, it follows of course that the pleas in question is unexceptionable. The plea of never indebted has however been usual to declarations of this kind, and to all the counts, although the second and third contain additional averments, not in the first—namely, the due making and publication of calls, the very thing traversed by the plea now under consideration, and the plea of *nunquam indebitatus* has been treated as traversing and putting in issue every material allegation contained in each count of such declaration. If I was quite satisfied of its inadmissibility, it would at once dispose of the demurrer;

but I am not so satisfied thereof as to feel warranted in determining against it without having the point fully argued. See the great North of England Railway Company v. Bid-dulph, 7 M. & W. 243, where *nunquam indebitatus* was pleaded to the third and fourth counts, but not to the two first, which were special, like those before us. For the purposes of the present case, I shall assume that it may be pleaded, and that its effects would be to deny the due publication of calls, in manner and form alleged; that allegation being treated as a condition precedent to the defendant's liability to be sued for the calls, although their publication is only enjoined by a proviso at the end of the 4th section of the act. It has not been contended that such proviso comes within the class of cases which distinguish between an exception in the enacting clauses of a statute and a separate proviso.—*Spieres v. Parker*, 1 T. R. 141; 8 T. R. 542; *Foster*, 430; 1 East. R. 644; 9 B. & C. 836. And, treated as a proviso annexed to matter of contract, it would, according to the usual construction of agreements *inter partes*, be considered additional. In *Smart v. Hyde*, (8 M. & W. 728,) Parke, B., said, "If the matter relating to the notice in that case had been by way of proviso upon the warranty, it might perhaps have been necessary to be stated in the declaration; but he declined giving an opinion on the point." And see *Harrington v. Wise* (Cro. El. 486), at the end.

In the case of *Smart v. Hyde*, a complete obligatory undertaking (a warranty) was to cease, or be considered as complied with, unless notice of unsoundness (of a horse sold) was given by twelve o'clock the next day. Here no liability accrued, even *prima facie*, unless the calls were duly published. I look upon it therefore as a condition precedent material to be alleged, and not a mere matter of defence to be pleaded.

No debt arose from the mere act of subscribing; but when the calls were made, each instalment might be regarded as *debitum in præsentī solvendum in futuro*. In the *Aylesbury Co. v. Mount* (4 M. & G. 665), Tindal, C.J., said it might be suggested that a party who becomes a

shareholder at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently, when an instalment is called for, it is *debitum in præsentis solvendum in futuro*; and that the shareholder at the time the call was made, being debtor, should therefore be the party to pay. It may be proper to consider then, when a call can be said to have been made as distinct from the period when it becomes payable; for, among other things, the time when a call is made is material, as respects the power of stockholders at that period to transfer their shares afterwards, before they become payable or are paid. The statute of 1 Wm. IV. ch. 12, sec. 6, renders the shares transferable on the books of the company after the first instalment shall have been paid. Any further restriction must depend upon by-laws made under sec. 10, or on general principles governing the transfer of stock in such institutions. In many of the Imperial Statutes, it is regulated by express enactment. (See the notes to the above cases).

In the *Sheffield Railway Co. v. Woodcock* (7 M. & W. 574), Parke, B., at p. 584, said, the notice in the newspapers, as it seemed to him, was the call: "It is equivalent to a demand on each proprietor personally." See also his language in delivering the judgment of the court. See *great North of England Railway Co. v. Biddulph* (7 M. & W. 243). Again, in *Shaw v. Rowley* (11 Jurist, 911; 16 M. & W. 810) he said, the call is not made until the resolution of the directors for such call is given to the shareholders or proprietors of the company; and (S. C. 2 Ex. R. 119: 12 Ju. 101) that a circular sent to every shareholder in a railway company, informing him that the directors had resolved on making a call, constituted a call in that case.

So far as material to be determined, it seems therefore that a call is considered to have been made whenever it is published as required in the proviso in section 4, though not payable for at least 40 days afterwards. And the distinction between the making and publishing a call, as an act done, and its becoming payable at the end of 40 days afterwards, should be observed. The proviso is that no

instalment shall be called for in less than 40 days after public notice thereof shall have been given; which may mean, that the 40 days' notice of the intention to make a call should precede its being made, and not that, when made, 40 days' notice of such call should precede its becoming payable. The latter, I believe, is the sense in which such provisions have always been understood; but in whichever light viewed, the present plea is not that the calls mentioned in the second and third counts were not made, but that public notice of such calls was not duly given as therein alleged.

In many of the adjudged cases in actions for calls, in the concise mode of declaring, the plea that the defendant was not a proprietor has been allowed to be superadded to that of never indebted, as if the latter did not embrace the former; while a plea denying due publication of the calls has been sometimes refused as included in the general plea of *nunquam indebitatus*, though at other times admitted. Now the statutes authorising the short form of declaring uniformly require the plaintiffs to prove, both that the defendant was a proprietor and that the calls were duly made, &c., and I do not perceive why both facts are not equally traversed and put in issue by the plea of never indebted, if the plea be admissible at all; respecting which no question seems to have been raised, unless in the case of the *Edinburgh, Leith and New Haven Railway Co. v. Hibbleswhite* (6 M. & W. 707; 8 Dow. 802).

Had the present declaration been framed in assumpsit, stating the defendant's promise as special to pay the instalments upon 40 days' publication thereof, as required by the act, with an averment of due performance, the plea of non-assumpsit would have only denied the express contract alleged, &c., and would not include a traverse of the alleged publication of the calls; and if the plea of never indebted is not to have a more extensive operation, it would not deny that averment. The plea, however, being, that the defendant was never indebted, and not merely that he made no such contract, it would seem to deny all material allegations in the declaration; and so the analogy between the

two general pleas in assumpsit and debt would not strictly hold, which is another argument against the admissibility of the general issue to declarations like the present.

In England, leave to plead double must be previously obtained from the court or a judge; while here a defendant is allowed to plead several pleas without such permission, by the statute 2 Geo. IV. ch. 1, sec. 7. But whether the plea in question be a single one, or one of several, can make no difference on demurrer, as the same objections may be equally taken to it when pleaded jointly or alone, and its validity must be judged of without reference to other pleas. The objection to it is, not that it is pleaded with the general issue, but that it amounts to the general issue; and which ought to have been pleaded in its place and alone. The allowance of the two pleas together, or the rejection of one of them, in England, is only therefore material as implying the impression of the courts or judges there that the plea denying publication would probably be deemed valid or invalid on demurrer. See *Sutherland v. Pratt* (7 Jurist, 180), where a plea was allowed, but afterwards held bad on demurrer. See also 7 Jurist, 261; 11 M. & H. 296; 12 A. & E. 497.

Pleas are open to exception, as amounting to or involved in the general issue, on three distinct grounds:

1st. As directly or in a negative form traversing one or more of several material allegations, which the general issue would equally traverse in common with the others; or

2ndly. In traducing new affirmative matter, amounting to an argumentative denial of the whole, or portions of the declaration material to the plaintiff's case; or

3rdly. Stating affirmative matter admissible in evidence under the general issue, to rebut the evidence of the plaintiff in support of the allegations traversed by the general plea; in other words, pleading matter of evidence only, not traversing or denying anything expressly, but indirectly controverting the plaintiff's case, and not confessing or avoiding. The case before us is of the first description, and a direct traverse. In *Hayselden v. Staaff* (5 A. & E. 153), Lord Denman, C. J., said, that although a defence might

be gone into under the general issue, it did not necessarily follow that the defence might not be specially pleaded on the record, referring to *Carr v. Hinchliff* (4 B. C. 547) as an instance. Again, he said, there is a great distinction between the case of a plea which amounts to the general issue, and a plea which discloses matter which may be given in evidence under the general issue; that under the latter the various things (previously) enumerated as performance or excuse thereof, &c., might be given in evidence under the general issue independently of any of the new rules, but it was incorrect language to say that these things amounted to the general issue—they only defeated the contract; but what, in correct language, might be said to amount to the general issue was, that for some reason specially stated, the contract did not exist in the form in which it was alleged; and where that was the case, it was an argumentative denial of the contract, instead of being a direct denial, which, according to the correct rule of pleading, was not allowed. He also referred to *Edmunds v. Harris* (2 A. & E. 414) as doubted in *Taylor v. Hilary* (1 Cr. M. & R. 741, 5 Tyr. 373,) and in *Knapp v. Harden* (1 Gale, 47); also in *Jones v. Nanney* (333), virtually overruling it. He also mentioned *Jolly v. Neish* (2 Cr. M. & R. 358, 5 Tyr. 625, and 1 Gale, 227); and held the plea in the principal case bad, as argumentatively denying the contract alleged.

In *Leaf v. Tuton* (10 M. & W. 397), overruling *Maggs v. Ames* (4 Bing. 470), Parke, B., said, “the case differed from those in which the contract was avoided by the statute or common law, for some matter which (admitting a color of action) was the subject of proof on the part of the defendant—such as usury, fraud, gaming, infancy, coverture, &c.—none of which amounted to a denial of the contract, but to a confession and avoidance, and should be specially pleaded under the new rules, though admissible under the old system under the general issue, which then amounted to a plea that there was no cause of action, or that it had ceased before suit; but they did not amount to the general issue—that is, to an unqualified denial of the facts alleged.”

In *Sutherland v. Pratt* (11 M. & W. 312), Parke, B., said the plea was bad at common law. "It is true it does not resemble most of the pleas which amount to the general issue, which usually contain new matter, and conclude with a verification, and are bad as argumentative denials; but this is bad on the ground that the law had provided an appropriate mode of denial of particular facts, which must be followed, and that in order to avoid long records (Hob. 127, citing various instances). In *Warner v. Wainsford* (Hob. 127), it is said, and has been formerly considered the proper course, not to demur to such like pleas, but to move the court to strike them out (see *Ward v. Blunt*, 1 Leo. 178); that the reason for pressing the general issue was not for insufficiency of the plea, but not to make long records where there was no cause." Another reason is given by Alderson, B., in *Gough v. Bryan* (2 M. & W. 773). He said the reason of the rule was, that by the general issue you give the plaintiff an opportunity of several replications, whereas by pleading the same defence specially, you drive him to one replication, taking issue on one fact. This of course can only apply where new matter is affirmatively pleaded, the whole of which would require to be proved at the trial, and which the plaintiff might repel by counter evidence, and thereby have a benefit equivalent to two or more replications, instead of being bound to traverse in a single replication a portion only of the various allegations contained, in and making up the whole plea or defence; and the learned baron added, "If indeed the general issue raises one fact only, that reason does not apply;" nor can it apply if the defendant traverses in direct terms one only of several material unconnected allegations contained in the declaration.

In *Carr v. Hinchliff* (4 B. & C. 547), and the cases there cited, the exceptions are noticed of admissible special pleas where they confess and avoid or answer the declaration by what is termed matter of law, although the same facts might be proved under the general issue. On the other hand several instances of matters pleaded both negatively and affirmatively, constituting only argumentative denials

of the material averments, or the gist of the declaration or count, and therefore bad, are mentioned by Parke, B., in *Sutherland v. Pratt* (11 M. & W. 312); and the modification of the old plea of *nil debet*, "that the defendant does not owe," &c., by the new rules (Cam.'s Rules, p. 56, Nos. 2 & 3), by substituting the plea of "never was indebted," &c., and the direction to deny specially (in No. 4, *ib.* p. 57), together with the whole scope and spirit of the new rules, and the right to plead double without leave of the court (stat. 2 Geo. IV. ch. 2, sec. 7), combine to render the older cases of difficult application to the present question. Perhaps, applied to a mere traverse of part of the declaration, a correct discriminating rule is suggested in what Parke, B., said in the last-mentioned case, at page 313, where, after noticing the action of debt for rent, in which *non est factum* or *non demisit* and *rien in arrere* are permitted, together with the plea of *nil debet*, (citing Gilb. C. P. 61), and confessing the difficulty of reconciling all that had been previously cited, and of the possibility of the above pleas, in debt for rent being formal modes of traverse peculiar to that action, he adds, "But whether that be so or not, there is no authority for holding that each fact constituting one entire proposition—as, that a valid contract was made between the defendant and plaintiff—can be made the subject of distinct traverse;" an observation emphatically applicable to the new rule determining the effect of the general issue in actions of assumpsit or of debt, when the analogy holds. In Gilb. Histy. C. P. 61, it is stated that the pleadings in other actions were settled conformably to what was done in the assize; for they gave the defendant, if it were a matter of fact, the liberty of pleading the general issue, or of traversing any material point of the declaration, but he could not plead a plea that amounted to the general issue, for pleas that amounted to the general issue were only facts on which the issue might be turned in evidence, and therefore were not issues of fact to be returned to the court, but matters of evidence to be determined by the jury, and consequently not a good plea, because they drew to the examination of the court what was proper to be determined by

the jury. But they gave the defendant leave to traverse any material point in the plaintiff's declaration, in order to bring that one single point in issue, and to which they might apply the evidence alone—instancing the case of debt for rent referred to by Parke, B., in *Sutherland v. Pratt*, 11 M. & W. 313; and see *Ba. Ab. Pleas*, G. 3; *Long v. Lee*, 4 U. C. Q. B. R. 377; *Tyr. Pl.* 80, 243, 140, 251, 258.

The rule of pleading is not that the issue must be joined on a single fact, out on a single point of defence.—1 Bur. 316; 2 B. & C. 608; 4 B. & C. 547; *Isaac v. Farrar*, 1 M. & W. 98, per Lord Abinger.

The cases of argumentative denials by pleading new affirmative matter, or matters admissible in evidence under the general issue, are such as—*Warner v. Wainsford* (Hob. 127), administratrix debt; plea, retainer for plaintiff's demand; demurrer, because defendant should have pleaded *plene administravit* (held good); and as some matter in law and in the note (a); and many cases are collected in the note to Stephen's Pleading, 465, last edition.

Instances of negative pleas amounting to argumentative traverses, are—

10 Hb. p. 16: Trespass to a warren—that there was no such warren; or to a close, &c.—*non depavit herbas*.

Debt for a horse sold—that defendant did not buy.

Gough v. Bryan, 2 M. & W. 772: Case for negligence—special traverse of the negligence.

Bridge v. The Grand Junction Railway Company, 3 M. & W. 245.

Green v. Pope, 1 Lord Raymond, 125: Case for false return—that it was true.

(a) *Jolly v. Neish*, 5 Tyrh. 625, 4 Dow 248; *Gregory v. Hartnoll*, 1 M. & W. 183; *Worrall v. Grayson*, 1 M. & W. 166; *Jones v. Nanney*, 1 M. & W. 333; *Hayselden v. Staaff*, 5 A. & E. 153, *Morgan Petren* 3 Bing. N. S. 437; *Smith v. Dixon*, 7. A. & E. 1; *Cleworth v. Pickford*, 7 M. & W. 315; *Hill v. Allen*, 2 M. & W. 283; *Brind v. Dale*, 2 M. & W. 775; *Payne v. Haly*, 5 M. & W. 599; *Prentice v. Elliott*, 5 M. & W. 666; *Collinbourne v. Mantell*, 5 M. & W. 289; *Leaf v. Tuton*, 10 M. & W. 393; *Dicken v. Neale*, 1 M. & W. 556; *Francis v. Baker*, 10 A. & E. 642; *Maude v. Nesham et al.* 3 M. & W. 502; *Cotton v. Browne*, 3 A. & E. 312, 4 N. & M. 831 S. C.; *Jacobs v. Fisher*, 1 C. B. 178; *Kemble v. Mills*, 1 M. & G. 757; *Redman v. Smith*, 8 Jur. 711.

West v. West, 1 Lord Raymond, 674: Case for false return—that defendant was not officer.

Taylor v. Sea, 2 Lord Raymond, 968: Assumpsit—general performance.

And see Doc. & Stu. 272, ch. 53.

The above cases are cited by Parke, B., in 11 M. & W. 313; and it will be observed, that to a certain extent, some of them, though virtually in the negative, are framed in an affirmative form—as the three last in Lord Raymond.

The cases more immediately applicable are—London and Brighton Railway Company v. Wilson and Fairclough, 6 Bing. N. S. 135, in which the defendants were allowed to plead “never indebted, and not a proprietor,” but not that due notice of the calls had not been given; and London and Brighton Railway Company v. Fairclough, in which the court set aside a judge’s order allowing pleas of forfeiture in addition to “never indebted, and not a proprietor.” These cases were followed by the Q. B. in S. of England Railway Company v. Hibbleswhite, 12 A. & E. 497, allowing “never indebted and defendant not a proprietor,” but rejecting that there was no notice of calls; The Aylesbury Railway Company v. Mount, 4 M. & G. 651; 5 Scott, N.R. 127; S. C. 2 Dow. N. S. 143; 7 M. & G. 798; S. C. 8 Scott, N. R. 586; Smart v. Hyde, 8 M. & W. 723—to be compared with 2 M. & W. 775, and 5 A. & E. 153; Kemble v. Mills, 1 M. & G. 757.

The case most in point is the Edinburgh, Leith and Newhaven Railway Com’y v. Hibbleswhite, 6 M. & W. 707; 8 Dow. 802, S. C. Debt for calls, under the stat. 6 & 7 W. IV. ch. 121, secs. 49 & 50, in the brief form: Pleas—1st, never indebted; 2nd, no notice of the calls, concluding with a verification, with two other pleas. Demurrer, as amounting to the general issue, and not concluding to the country. The court held the second plea bad, for not concluding to the country, taking no notice of the other ground, though pressed in argument. In reference to the second plea and the want of any averment in the declaration that notice of the calls was given, unless by implication, in relation to the statutes, Lord Abinger, C. B., said, “In order to make the

declaration good, the act must be referred to ; and it must be taken that the declaration includes all the facts necessary to be proved, and among them the averment of notice to the defendant. The case, then, falls within the fourth rule, which requires the defendant, in actions of debt other than simple contract, to deny some particular fact alleged in the declaration. If the declaration had contained an averment of notice, that would have been admitted unless denied by plea (5 Bing. N. S. 686), regarding it, perhaps as matter of inducement or breach of contract. The result is, that the plea ought to have concluded to the country, and is bad on that special ground."

Alderson, B., said the averment that the defendant was not indebted, must be considered as impliedly denying all those facts which the statute has required to be proved as conditions precedent to the right to recover ; but the proper mode of pleading is to traverse the allegation in terms.—7 M. & W. 243, already mentioned.

Newry and Enniskillen Railway Company v. Edmunds (2 Ex. 119). Debt for calls under 8 & 9 Vic. c. 16, sec. 26, the defendant pleaded "never indebted," and also pleas denying that defendant was the holder of the shares, and denying that the calls were made, on which issue was joined. So in the Shropshire Railway Company v. Anderson (13 Jur. 175), debt for calls, under the stat. 8 Vic. ch. 16, sec. 26, Rolph, B., allowed three pleas similar to those above to be pleaded, and refused two others, which the court afterwards refused leave to add. The case in 6 M. & W. 707 appears to me quite in point, and the course followed in still later cases is quite consistent therewith ; and whatever be the true ground of that decision, taking it to approve of the plea, when concluding to the country, I must say I think the correct rule to be deduced from all the cases is contained in what is laid down in Gilb. C. P. 61, and said by Parke, B., in 11 M. & W. 312, taken in connection with the new rules—which is, that in a declaration framed like the present, no single fact constituting a part only of one entire proposition can be singled out and traversed either directly or argumentatively, but that colla-

teral or independent allegations, whether constituting matter of inducement or matter subsequent, as performance of a condition precedent, may be denied singly, and consequently the alleged public notice of the calls may be traversed in terms. In the absence of any express authority, of course this conclusion is adopted with hesitation and reserve, but it seems to me to conflict with no case or settled rules of pleading, and to be consistent with reason and the theory of pleading, and the new rules.

I think, therefore, judgment should be against the demurrer.

McLEAN, J., and SULLIVAN, J., concurred.

THE MARMORA FOUNDRY COMPANY V. DOUGALL.

Process issued 6th April, 1850.

Declaration dated 5th September, 1850, in an action of debt for 37*l.* 10*s.*

The declaration contains three counts, similar to those in the three former cases.

The pleas are—1st that the defendant never was indebted in manner and form as in the declaration alleged, concluding to the country, and issue.

2nd. That the plaintiffs induced the defendant to subscribe for the said stock by fraud and covin.

3rd. That after subscription and default, &c., at a general meeting of the directors duly elected, they elected to forfeit the said stock for which the defendant had subscribed, as in the declaration mentioned, and did forfeit the same, and the same became forfeited to the plaintiffs, and that the defendant had notice thereof, and acquiesced therein, of which the plaintiffs had notice.

Replication.—1st. Similiter to first plea.

2nd. De injuria to second plea and issue.

3rd. That the directors did not elect to forfeit the said stock, nor did they forfeit the same or any part thereof, *modo et forma*, &c., concluding to the country and issue.

This cause was tried before Mr. Justice Sullivan, at the last Belleville assizes, when the plaintiffs proved—

1st. The signatures of Peter McGill and Anthony Manahan to a paper or notice, as follows:—"According to the 3rd section of the 12th chapter, first William the Fourth, for the purpose of opening books of subscription for the stock in the Marmora Foundry Company, we the surviving persons, by the said act authorized, hereby direct and appoint that books of subscription be opened at the following places, and by the following persons, on the dates therein mentioned: at Belleville, on the 17th October, by M. Sawyer, Esq."—with other places and names added, but no year mentioned. That after a public meeting, held in 1848, this paper was drawn up and signed by Mr. Manahan; that it was then transmitted to Mr. McGill, at Montreal, and within a week or ten days returned, signed by him; that Hetherington (named in the act) was dead; that the book produced was opened at Sawyer's, at Belleville, on the 17th of October, and that other books were opened at other places, including one at Cobourg, opened the 17th October, 1848, in which William Weller subscribed for ten shares.

2nd. The defendant's signature, on the third page of the book produced, which was headed "A subscription list of stockholders of the Marmora Foundry Company, proposed to be established by virtue of and under authority of a statute of the late provincial parliament of Upper Canada, passed the 16th of March, 1831, in the first year of the reign of his late Majesty King William the Fourth, chapter 12; and the undersigned hereby promise to pay the amounts set opposite to their respective names, to the party hereinafter authorized to receive the same, in such instalments as are authorized by the statute, after the election of the directors by the stockholders shall have taken place, in accordance with the provisions of the enactment referred to—the subscription being as follows :

"B. Dougall, solicitor, Belleville—No. of shares, 10—125/." the date not being inserted or known, nor whether it was before or after the consent of McGill and Manahan had been obtained as aforesaid.

3rd. that upwards of 20,000*l.* of stock was subscribed

for ; after which a notice was drawn up for publication, as follows :

“Marmora Foundry Company. Notice.—Whereas upwards of 20,000*l.* stock has been subscribed in the Marmora Foundry Company : we do hereby give notice that the first election of directors in the said company will be held at the court-house in the town of Belleville, on Wednesday the 27th day of December next, at the hour of two o’clock, p. m., in accordance with the provisions of the act 1 Wm. IV. ch. 12 ; of which all stockholders are hereby required to take notice. Belleville, November 18, 1848. Signed B. Flint, jr. ; G. Benjamin ; Joseph Vannorman ; E. Murney ; E. J. Levisconte ; P. Robertson ;” all of whom were subscribers to stock of the company.

4th. That defendant in person then admitted in writing the giving and publishing of the respective notices mentioned in the declaration in this cause, and that the same were given and published respectively, as stated therein, in the respective newspapers and gazettes and at the times in the said declaration mentioned.

5th. It was then proved that on the 27th December, 1848, Joseph Vannorman, William Weller, Nelson G. Reynolds, Peter Robertson and Robert Reid, were duly elected directors, at the court-house in Belleville, each of whom was a subscriber to the number of ten shares at least ; also that five directors were regularly elected in August, 1849, and on the first Monday in August, 1850.

6th. The minute book of the plaintiffs was produced, and entries proved to have been regularly made therein read, and shewing a call on the 20th April, 1849, of ten per cent., payable on the 5th June, 1849 ; and another on the 25th September, 1849, of ten per cent., payable the 10th November, 1849 ; also of the second and third elections of directors, on the 20th August, 1849, and 5th August, 1850 ; also a resolution of the president and two directors, dated the 1st August, 1849, as follows ;—“ Ordered, that the names of all subscribers to the capital stock of the company, who have not yet paid any instalment on the same, be erased from the subscription stock-books of the company.

For the defendant, a nonsuit was moved on the following grounds :

1st. Because it was not shewn that the books of subscription in which the defendant had subscribed his name, were opened within two months from the passing of the act of incorporation.

2nd. Because it was not shewn that the said book was opened by authority of Thomas Hetherington, Peter McGill, and Anthony Manahan.

3rd. Because it was not shewn that Thomas Hetherington made any conveyance of the property on which the works were to be carried on.

4th. Because no notice of the election of directors or of calls was proved.

5th. Because there was no proof of payment of a deposit of 1000*l*.

These were overruled ; and the defendant then proved that a book produced had been recently found amongst the papers of James H. Lawson, Esq., deceased, who was general agent of Hetherington and McGill ; and that it was the original stock-book of the company, and in all probability opened shortly after the passing of the act. A witness (McAnany) recognized the book, and proved his own signature therein as a subscriber, in 1831-2 or 3, at the request of Hetherington, who was at Belleville obtaining subscriptions. The defendant's name does not appear in this book as a subscriber. It is prefaced by a prospectus and estimate, and a copy of the act of incorporation in print, and is then headed as follows :—"The Marmora Iron Works are to be carried on by a joint-stock company, according to the act of incorporation hereto prefixed. We, the subscribers, take shares in the said company, subject to the said act, to the number and amount opposite our respective names, and on the condition and value put upon the property as stated in Hetherington's letter, also prefixed—namely, of 15,000*l*. currency."

Subscribers. | Names. | Residences. | Shares. | £12 10*s*. each. | Amount.
It contains upwards of thirty signatures, for upwards of one hundred shares in all, from one to ten, respectively.

The case being then left to the jury on the evidence, they found for the plaintiffs—12*l.* 10*s.* debt on each count separately, and 3*l.* 5*s.* 8*d.* damages for interest thereon, &c.

In Michaelmas term, 1850, *Eccles*, for defendant, moved for a rule to set aside such verdict for misdirection, avowedly for the purpose of paving the way to an appeal under the new rules of the Court of Appeal, the points having been already decided by this court in former similar cases; and a rule nisi was granted with this view, against which *Hagarty*, for the plaintiffs, shewed cause during the same term; but *Eccles* did not appear to support it, probably considering it as only moved *pro forma*, and supposing that it would be discharged as governed by former decisions.

MACAULAY, C. J.—The facts appearing at the trial must be stated in the event of an appeal. I have therefore made a statement of the evidence, and of the points submitted at nisi prius.

1. The first point was disposed of in the cases of the present plaintiffs against Murney, on demurrer, and again in the three former cases.

2. The second point was decided in the case against Murney, upon the trial of the issues. The evidence given on the defence in this case shews that Hetherington was an active party in the first opening of books and soliciting subscribers, &c.

3. The third, fourth, and fifth, are also disposed of by a reference to Murney's case. I think, therefore, the rule should be discharged. It may also be observed that all the foregoing objections are raised under the plea of never indebted, not by special pleas, and that we are not to be understood in determining that it is open to the defendant to take such exceptions under that plea. If material, it would have been necessary to have considered that question.

MCLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule discharged.

RIORDEN AND RIORDEN, ADMINISTRATOR AND ADMINISTRATRIX OF THOMPSON, V. BROWN.

The plaintiffs having obtained letters of administration, brought an action of detinue to obtain possession of an indenture of mortgage in fee, made to the intestate, and after his death in the possession of the defendant. *Held, per Cur.*, that the title to the mortgage follows the legal estate, and that it therefore belongs to the mortgagee's heir.

Semble, that a lien may be specially pleaded in an action of detinue.

Detinue upon a bailment, laid on the 20th August, 1850, after the death of Daniel Thompson, for an indenture of mortgage (whereby Thomas Mitchell, in consideration of 100*l.*, did grant, bargain and sell unto the said Daniel Thompson, the south half of lot No. 12, in the 13th concession of the Township of Tecumseth, to hold to him, his heirs and assigns forever; which indenture was subject to a certain condition therein, that the same should be void upon payment by said Mitchell, his heirs or executors, &c., unto the said Thompson, his executors, administrators, or assigns, of the sum of 100*l.* with interest as therein specified) of the plaintiffs, as administrator and administratrix as aforesaid, of the value of 100*l.*, to be delivered by defendant to plaintiffs, as administrator and administratrix as aforesaid, on request. A special request since the death of the intestate is then averred by plaintiffs, administrator and administratrix as aforesaid, and a refusal alleged, and profert is made of the letters of administration.

Pleas—1st. No detinet.

2nd. That said deed was not the chattels and property of plaintiffs, as administrator and administratrix as aforesaid, as in the declaration alleged—to the country, and issue.

3rd. That Thompson duly made a will for passing personal property, whereby he demised and bequeathed the said indenture of mortgage, and the money therein mentioned, and all interest therein, to defendant to hold as his own property; and that he took possession thereof after his death, which is the detention, &c.

4th. That said Thompson was indebted to defendant in 60*l.*, and in his lifetime deposited the said indenture of mortgage with him as a security to hold till paid, &c.

Replications—1st. Similiter.

2nd. That Thompson did not devise and bequeath said mortgage to defendant *modo et forma*—to the country, &c.

3rd. That it was not agreed between defendant and Thompson in his lifetime, in manner and form alleged—to the country and issue.

The cause was tried before Mr. Justice Burns at the last Toronto assizes, when a general verdict was rendered for the plaintiffs, and the value of the security assessed at 135*l*.

1st. The mortgage was produced at the trial, and appeared to be an indenture made the 14th January, 1845, between Thomas Mitchell, of, &c., of the first part, and Daniel Thompson, of, &c., of the second part. Whereby in consideration of 100*l*., &c., Mitchell conveyed to Thompson, in fee, the south half of lot No. 12, in the 13th concession of Tecumseth, containing 100 acres of land, with a proviso that the same should be void upon payment of 100*l*. on the 18th October, 1850, with interest on the 1st of January in each year, the first being paid in hand; and the second year's interest to become due and payable on the 1st January, 1846, and so on yearly. And the mortgagor did for himself, his heirs, executors and administrators, covenant with the mortgagee, his heirs and assigns that he, his heirs, executors or administrators would pay to the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money, and interest, at the day, time, and in manner appointed therefor, &c. It is executed by both parties.

2nd. A demand of the deed, and refusal to deliver it up, was admitted.

3rd. That Daniel Thompson was the father of the administratrix, and had boarded with the defendant about two years before his death.

4th. That when the mortgage was demanded of the defendant, he said he had nothing against the intestate except the funeral expenses, but would not give it up because he had heard the mortgagee had made a will, and was afraid some parties might call upon him.

For defendant—1st. The defendant's counsel offered to prove a noncupative will by Thompson the mortgagee,

giving the security to defendant; but it was rejected^d by the learned judge, on the ground that it should have been established in the Surrogate Court, and could not be set up in this form against the letters of administration granted to the plaintiffs.

2nd. That the deceased was indebted to the defendant for board and lodging as justification for holding the mortgage deed as a lien of security; this was also overruled, the learned judge saying that the pleas which involved the foregoing questions might have been demurred to as raising immaterial questions, and that they could not prevent the plaintiffs recovering, and though pressed to receive it, he rejected the evidence offered. In Michaelmas Term, 1850, *Dempsey* for the defendant, obtained a rule, calling on the plaintiffs to shew cause why the verdict should not be set aside on the grounds—

1st. Of the rejection of evidence offered in support of the 4th plea.

2nd. That the second issue should have been found for the defendant, the plaintiffs having no legal right to the mortgage, which was in fee.

Hallinan, for the plaintiff, shewed cause in the same term. He contended that the probate or surrogate courts could alone determine whether the deceased made a will of his personal property.

Ba. Ab. Exors. E. 1.—Wherefore no legal proof of a will was or could have been offered or given except by letters of administration revoking the administration to plaintiffs, whose right, as representing the deceased, should have been denied by plea.

That the plaintiffs were entitled to the mortgage as against the defendant, who shewed no right thereto, and was wrongfully in possession; and *tort feasor* the plaintiffs having a right to the money secured thereby, and to the covenant therein, on which they might sue for the recovery thereof.—1 Wills. Exs. 132.

The stat. 12 Vic. ch. 71, sec. 9—That after satisfaction to the plaintiffs, they might release the estate, which would be equivalent to a re-conveyance.

Eccles, in reply, contended that the mortgage followed the estate, which in law descended to the heir-at-law of the mortgage: that it was over-due at his death, and the heir, and not the plaintiffs, was entitled thereto; wherefore, as they never had possession, did not in fact deliver it to the defendant, but are driven to rely upon proof of a legal title and right to possession, their case entirely fails—4 Bing. 106: that under the statute the plaintiffs, at the utmost, had only power to release or re-convey the estate: that the heir-at-law, could equally do so by virtue of his legal estate and interest, and that such interest in the heir, and not the power vested in the plaintiffs, which could not be exercised until after satisfaction of the debt secured by the mortgage, drew to it the right and title to the instrument as following the estate and the possession thereof.

MACAULAY, C. J.—The statutes relative to mortgages are—4 Wm. IV. c. 16; 9 Vic. c. 34, s. 24; 10 & 11 Vic. c. 16; 12 Vic. c. 71, s. 9; 12 Vic. c. 73.

It is said in Co. Lit. 39 (a), guardian in a chivalry shall not plead detainment of the charters, because the charters, concerning the inheritance of the heir, belong not to the guardian—9 Rep. 15 b., and 18 Dyer, 230 (No. 52); Parke on Dower, 294-5; Dixon on Title Deeds, 12-16, and sequel ib. 45 to 48, 83; Moore, 488; And. 269; Lord Buckhart's case, 1 Rep. 1; Com. Dig. Charters A.; Yea v. Field, 2 T. R. 708; Hooper v. Ramsbottom, 6 Taunt. 42; 1 Mar. 414, S. C.; Fowle, ex v. Welsh, 1 B. & C. 29; Jud v. Wardle, 6 Bing. N. S. 680; Robertson v. Showler, 13 M. & W. 609; Davies v. Vernon & Minshall, 6 Q. B. 443; Owen v. Knight, 4 Bing. N. S. 54; Austin v. Croome, 1 C. & M. 653; Phillips v. Robinson, 4 Bing. 106; Coote on Mortgages, 166, 509 to 10, 3rd ed.; Viner Detinue, see pl. 2; Harrington v. Price, 3 B. & Ad. 170; Goode v. Burton, 1 Ex. R. 189.

The plea of "not possessed" puts the property of the plaintiffs in issue (Broadbent v. Leaward, 11 A. & E. 209, Mason v. Farril, 12 M. & W. 684); and as they (the plaintiffs) were never in fact possessed, and did not place the defendant in possession of the mortgage, they must rely

entirely upon proof of title and right to the possession as against him. The cases above mentioned shew that the title to the mortgage follows the legal estate, and therefore that it belongs to the mortgagee's heir; and I do not find that the plaintiffs' being entitled to sue on the covenant therein (which is not stated in the declaration), or to the money secured, or to acquit the mortgage so as to operate as a reconveyance made under the statute mentioned, entitle them to maintain *detinue* for the mortgage deeds.

The qualified power to reconvey imparted by the 12 Vic. ch. 71, sec. 9, is the strongest ground in favour of the right asserted in this action; but I do not find authority for holding that a party entitled to convey in execution of a power, is therefore entitled to the possession of the title deeds, or of any of them. The legal right to title deeds is much discussed in the case cited from Moore 488, and 1 Rep. 1, also in Dixon on Title Deeds; but I nowhere find anything to support the claim set up by the present administrators to the mortgage in fee.—*Galliers v. Moss*, 9 B. & C. 267; *Benvois v. Cooper*, 6 Mod. 371. I think, therefore, that there should be a new trial on this ground.

As to the third plea, the only admissible evidence of a will of personal property is the probate.

Taylor's Evidence, page 1049, sec. 1165.—No such evidence was offered; and if it had been, it would have been inconsistent with the letters of administration to the plaintiffs, which are not denied or shewn to have been revoked; and there was no legal evidence of a devise of real estate.—*Wils. Exs.* 58-9; *Swinburne on Wills*, 56-7, 59, 554-5; 2 P. W. 536; *Powell on Devises*, 62-3; stat. 29 Chas. II. ch. 3, secs. 5, 19. The learned judge could not therefore have ruled otherwise than he did.

As to the fourth plea, a lien may be specially pleaded in *detinue*.—12 A. & E. 116, 209; *Mason v. Farrel*, 12 M. & W. 674, 983; 13 M. & W. 609. This is not a plea of set-off, but it sets up a lien; and without considering whether the pleas are good or demurrable, the usual course now is to try all the issues, if only with a view to costs.—4 N. & M. 551; *Bowman v. Roston*, 1 H. & W. 222; *Tyr. Pls.* 765;

Jarvis's Rules, 80; Tickler v. Rowlang, 4 A. & E. 868; 3 Bing. 381; 1 Bli. N. S. 545; 4 M. & W. 444; 3 M. & W. 493; 5 A. & E. 488; 4 Bing. N. S. 449.

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule absolute.

JONES v. DUNN.

Plea to declaration for malicious arrest—that defendant had reasonable and probable cause for arresting the plaintiff, and did so without malice, for that the defendant had recovered a judgment, &c., against the plaintiff, and that while the judgment remained unsatisfied, the plaintiff continued in possession, &c., of certain household furniture, &c., and that the plaintiff made an assignment to A. B. of said household furniture, and that by means of the said assignment, the plaintiff had prevented the said furniture &c., being taken in execution, and was enabled to hold the same against the claim of the defendant; and so the defendant saith, that the plaintiff being in possession, &c., and having made such assignment, &c., and prevented the same being taken in execution, &c., the defendant had reasonable and probable cause for arresting him as in the declaration alleged.—*Held* bad on a special demurrer for uncertainty, and as amounting to the general issue.—*Held also*, that either party may set down a demurrer for argument, and causes of general demurrer should be delivered to the judges in the form of notes by the opposite party to the one setting down the demurrer for argument.

Declaration states that the defendant, on the 12th day of July, 1850, not having any reasonable or probable cause for believing that the plaintiff had parted with his property, or made some secret or fraudulent conveyance thereof to prevent its being taken in execution, but wrongfully intending, &c., falsely and maliciously made an affidavit in the County Court of the county of York, before a commissioner, &c., that he had reason so to believe, &c.; and afterwards on the 29th of July, 1850, by virtue thereof, caused a writ of *capias ad satisfaciendum* to be issued against the plaintiff, &c., directed to the sheriff of the said county, for 24l. 14s. 11d., recovered in the County Court of the united counties of Leeds and Grenville, &c., and maliciously caused the plaintiffs to be arrested thereunder and imprisoned till he gave bail to the limits, &c., stating the recognizance of bail; by means whereof, &c.

Plea—That defendant had reasonable and probable cause for arresting the plaintiff, and did so without malice; for that on the first of June, 1850, he recovered judgment in the County Court of the united counties of Leeds and Grenville against the plaintiff, stating the same; that he caused it to be exemplified into the County Court of the

county of York, and issued a writ of *capias ad satisfaciendum* thereon, having made affidavit, &c., under which the plaintiff was arrested; and that previous to making such affidavit, and while the said judgment remained unsatisfied, the plaintiff and his family continued, and still continue, in the possession, occupation and enjoyment of the said household furniture of the plaintiff, in Cobourg, in the united counties of Northumberland and Durham, of great value, to wit., 200*l.*; and that the plaintiff made an assignment and conveyance thereof to Alpheus Jones, his father, on or about or some time in the month of January, 1850, (the defendant not knowing the particular time,) and that by means of the said assignment, the plaintiff had prevented, and then prevented the said furniture and effects from being taken in execution, and was enabled to hold the same against the claim of the defendant under and by virtue of the said judgment; and so defendant saith, the plaintiff being and continuing in possession of the said furniture and effects as aforesaid, and having made such assignment and conveyance thereof as aforesaid, and holding and preventing the same from been taken in execution, the defendant had reasonable and probable cause for arresting him as in the declaration alleged, concluding with a verification.

Demurrer—Special causes assigned.

1st. That the plea is inconsistent in averring that at the time of the judgment recovered the plaintiff was in the possession, occupation, and enjoyment of the plaintiff's furniture and effects; and that in January he had assigned the same to his father.

2nd. That such assignment is not alleged to have been fraudulent, or without consideration, or not *bona fide*, or to defeat creditors or the defendant of his judgment.

3rd. That the plea shews the assignment to have been long before the judgment.

4th. That it amounts to the general issue or matter of evidence admissible under the general issue, and tending to prolixity in pleading.

5th. That the plea is made up principally of matter of evidence.

6th. That it contains no defence to the action.

7th. Nor do the facts stated afford a reasonable or probable cause for the defendant believing that the plaintiff had parted with his property, &c., to prevent its being taken in execution.

8th. That the plaintiff may have had abundance of other property which defendant might have taken, the contrary not being averred.

9th. That the defendant might have taken the furniture and effects mentioned, for all that is shewn.

10th. That the plea tends to perplex the plaintiff in replication, and is inartificial.

The defendant joins in demurrer.

Additional grounds stated by plaintiff on the margin of the demurrer book : That it is not stated that at the time of the assignment therein mentioned, the plaintiff was in any manner indebted to the defendant, or that he had at that time commenced the action.

Upon the case coming on for argument, a question was raised by *Read*, counsel for plaintiff, as to whose demurrer books were to be received by the court, each party having delivered copies.

The declaration is dated the 3rd October, 1850; the pleas being the general issue and the one demurred to, are dated the 10th of October, 1850, and the replication the 17th of that month. On the 24th of October the defendant joined in demurrer to the 2nd plea.

On the second day of Michaelmas Term, 1850, the defendant set down the demurrer for argument, and delivered demurrer books to each of the judges. On the 3rd day of the same term the plaintiff delivered books also; the issue in fact not then having been tried. The plaintiff's demurrer books contain marginal notes of grounds of general demurrer, which do not appear on the books delivered by the defendant.

Read contended that the plaintiff had a right to control the proceedings till the issue to the country was disposed of.

Crooks, for defendant, contended that by the new rules either party might set down the demurrer for argument, and deliver books, &c.

MACAULAY, C. J.—In England, by the rule H. T. 4 Wm. IV. No. 6, no rule for a concilium is required, but demurrers shall be set down for argument at the request of either party, and notice thereof shall be forthwith given by such party to the opposite party. By No. 7, four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book to the lord chief justice and senior judge, and defendant to the other two judges: and in default by either party, the other on the following day may deliver such copies and supply the default, for which the party in default must pay—14 M. & W. 120. The issue, or demurrer book, is by R. 4 Wm. IV. 21, s. 5, made up by the suitor, his attorney or agent, usually by the plaintiff's attorney—1 Arch. N. Prac. 321; and delivered to the attorney of the opposite party—3 Dow. 27; 4 N. & M. 89; 1 A. & E. 204.

By express rule in Common Pleas, R. T. 11 Geo. IV., and the practice of the other two courts, each party, besides delivering copies of the demurrer books to two of the judges must also furnish the clerks of the other two judges with copies of the points intended for argument, which are marked in the margin of his demurrer books, &c.

Maule, J., states the practice to be for each party to deliver his points of exception to the opposite pleading to the judges of the court, and that either party may obtain a copy of his adversary's points from the judges' clerks—unless, as is most usual, there is courtesy enough to exchange the points mutually designed for argument—See 5 Scott, 155, and Michaelmas, 17 Car. I. 1641; rule B. R. Easter, 2nd Jas. II.; Michaelmas, 38 Geo. III.; 3 Dow. 27; 1 A. & E. 204; 4 N. & M. 85; 1 Q. B. 498; 9 M. & W. 684; Cracknell v. Trueman. 2 Saund. 300 (3); 13 East. 417; Burdett v. Coleman, Gib. C. P. 67, 3rd edition; Bird v. Higginson, 5 A. & E. 83.

The foregoing authorities shew, that though the general rule is, that the plaintiff has the option to try the issues in fact before, or to defer them until after the argument of the demurrer; the court has, nevertheless, a discretion, and the effect of the rule empowering either party to set the demurrer down, seems to be to render it optional with either party,

so to proceed irrespective of the issues in fact, unless restrained by the court on motion the course taken in *Cracknell v. Trueman*.

As to our own practice, by new rule 5 Vic. No. 14 (*Cameron's Rules*, page 23), the party demurring was allowed to insist, at the time of the argument, upon any further matter of law of which notice should have been given to the court in the usual way. Again, by No. 20 (p. 28), demurrers, &c., shall be set down for argument at the request of either party, with the officer of the court, and notice thereof shall be given to the opposite party four days before the time appointed for such argument; and by No. 21, four days before the day appointed for argument, the party setting down the case for argument shall deliver a copy of the demurrer book to each of the judges, otherwise the case shall not be considered as standing for argument. Again *R. H. T. 13 Victoria* p. 9, No 27, provides, that the party demurring may, at the time of the argument, insist upon any further matters of law which shall have been entered in the margin of the demurrer books at the time of the delivery of the same, and of which notice shall have been given to the opposite party before the demurrer books are delivered. And by No. 28, rescinding the rule of *E. T. 7 Vic.*, four days before the day appointed for argument, the party setting down any case for argument, shall deliver a copy of the demurrer book to each of the judges, otherwise it shall not be heard. No. 29 provides for cases in which the party setting down the demurrer for argument shall have omitted to enter any exceptions made by the opposite party, of which he had received due notice. Our rules do not in terms provide for the present case; where the party setting down the cause is the defendant and not the plaintiff, and not the party demurring; but issue or paper books having been done away with by new rules No. 19 (*Cameron's*, page 27), and the *R. H. T. 13 Vic.*, No. 23, p. 7, and joinder in demurrer having been entered by the defendant, the case was ripe for argument, and the rules clearly authorize either party to set it down. I therefore consider the defendant's proceeding regular. He could not

note additional points of which he had no notice when he delivered the demurrer books ; and, according to the general course in England, it was for the plaintiff to deliver a note thereof to the judges afterwards. This has been done by delivering several copies of the demurrer books, which I do not think the proper mode ; a separate note is all that is required, and the demurrer books unnecessarily furnished should not be allowed on taxation.

I do not find that the plaintiff has an arbitrary control over the demurrer until the issues in fact are tried ; if he had, he might delay the defendant most unreasonably, since it has been decided (a) that for delay in trying the issues, the defendant cannot obtain judgment as in case of a nonsuit, owing to the demurrer standing undisposed of on the record ; besides, it would seem in direct contravention of the new rule, to hold that a defendant cannot set down a demurrer for argument so long as issues of fact remain to be tried.

The rule requiring the party setting down the case for argument to deliver all the demurrer books, was occasioned by the delays and difficulties experienced under the former rule, requiring each party to deliver two, &c. No doubt owing to the uncertainty of each party, whether the other will prepare books and set down the cause, each may incur the expense of preparing them, and the allowance on taxation be made to depend upon who is most prompt in delivering them after joinder in demurrer ; but is a contingency not provided for in the rules ; and in the absence of any explicit order on the point, the only course would seem to be for the attorneys of the respective parties to act in concert as suggested by Maule, J., in 5 Scott, 155, both as respects the preparation of the demurrer books and the intercommunication, entry, and notice of additional points desired to be urged on special demurrer.

We think, therefore, that the demurrer should be argued on the books delivered by the defendant's attorney on his setting down the case.

(a) 2 Mar. 364 ; 1 Dow. N. S. 769.

I find no trace of the case cited.—McDonell v. Sherwood.

Then, as to the demurrer—the cases referred to in the *Marmora Foundry Company v. Ruttan* (1 U. C. C. P. R.), shew that the plea is bad, as being matter of evidence admissible under the plea of not guilty; and also as calculated to deprive the plaintiff of the opportunity of several replications as suggested by Alderson, B., in 2 M. & W. 773.

It is intended as a plea in justification, and not in excuse; and is not, therefore, one to which *de injuria* would probably be admissible. The matter pleaded may be proved at the trial to rebut a *prima facie* case of the plaintiff, if he makes one; he must give sufficient evidence of the want of probable cause; and whatever he is bound to prove, under the general issue, the defendant may controvert by opposite evidence—1 Stra. 181; 2 Saund. 158 (3).—See *Mure v. Kay*, 4 Taunt. 34. In trespass and false imprisonment, a plea justifying an arrest by a private person, on suspicion of felony, must shew the circumstances from which the court may judge whether the suspicions are reasonable.—*Cotton v. Browne*, 3 A. & E. 312; 4 N. & M. 831, s. c. In an action on the case for maliciously indicting the plaintiff without probable cause, the defendant may give evidence of probable cause under the general issue; and a plea that he had probable cause pleaded in addition to not guilty, was struck out.—See also what Lord Denman said in *Hayselden v. Staff*, 5 A. & E. 153, on this point.—*Hounsfield v. Drury, et al.*, 11 A. & E. 98; *Sutherland v. Pratt*, 11 M. & W. 297; *Watkins v. Lee*, 5 M. & W. 270, 1 C. B. 316; *Mummery v. Paul*, ib. 325; *Petrie v. Lament*, 3 M. & G. 702; 10 Jur. 1061 s. c.; *Bryant v. Robbett*, 11 Jur. 1021; *Daniels v. Fielding*, 16 M. & W. 200. If otherwise unexceptionable, the sufficiency of the facts pleaded to shew probable cause, is for the court.—*Blackford v. Dodds*, 2 B. & Ad. 179; *James v. Phelps*, 11 A. & E. 483; *Patton v. Williams*, 2 Q. B. 169; *Hinton v. Heather*, 14 M. & W. 131; *Wren v. Heslop*, 12 Jur. 600. But that does not render it a plea of matter of law within the rule on that subject; it does not confess and avoid the gist of the declaration—namely, a proceeding and arrest

without probable cause and maliciously ; cases of trover are analogous.—*Mason v. Farnell*, 12 M. & W. 683 ; *Higgins v. Thomas*, 8 Q. B. 908.

Delegal v. Highley, 3 Bing. N. S. 950—case for a malicious charge before a magistrate ; plea, special, setting out the facts to shew probable cause ; demurrer, as amounting to the general issue, and other grounds. The case was disposed of on another ground, shewing the present plea bad in substance,—namely, the want of any allegation ; that the defendant knew, or was influenced by the facts stated in the plea, if open to the plaintiff to urge it on this demurrer, (a) whether bad as amounting to the general issue, was not decided. *Tindal, C. J.*, said, if the defendant, instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, he must allege, as a ground of defence, that which would be so important in proof under the general issue—namely, the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, that it existed in his mind at the time the charge was laid, and was the reason and inducement of his putting the law in motion ; the plea was not, however, condemned on the other ground, though certainly open to the objection taken, according to many of the authorities, it is not however quite like the present in the form or matter of it.

The present plea alleging, that the defendant had reasonable and probable cause, resembles that in *Green v. Poper*, 1 L. R. 125—that an alleged false return was true, an argumentative denial that it was false ; so the allegation without malice is open to like observation. The plea concludes by re-affirming that he had reasonable and probable cause for arresting.

It seems to be a bad plea on the second, third, fourth, and fifth grounds of special demurrer, independently of the first, seventh, and eighth ; as to which, were it necessary to express an opinion thereon, I should be disposed to say that the plea is bad in substance, as not shewing in the facts as

(a) *Saxon v. Castle*, 6 A. & E. 652 ; *Broad v. Ham*, 5 Bing. N. S. 722.

stated the existence of a reasonable and probable cause for the defendant's entertaining the belief alleged by him.

It is faulty in its commencement and conclusion, as argumentatively denying the allegation in the declaration; that he caused the plaintiff to be arrested without reasonable or probable cause, and maliciously, instead of pleading not guilty. It is faulty in the body of it, for pleading facts, from which other facts, material to the issue, are to be inferred.

See the language of Coltman, J., in *Sanderson v. Coleman*, 4 M. & G. 209.

It would compel the plaintiff to re-assert, by way of replication, that he had not reasonable or probable cause, and did act maliciously, if that would be admissible, or to traverse or take issue upon some of the matters of fact alleged in the plea, as shewing the existence of reasonable and probable cause, and thereby accomplishing what Alderson, B., spoke of in 2 M. A W. 773.

It appears to me clearly inadmissible.

McLEAN, J., and SULLIVAN, J., concurred.

Judgment for the demurrer.

HEALEY v. BONGARD.

Assumpsit for money lent, and money had and received. On the 6th September, 1842, the wife of the plaintiff, with his assent, in consideration of 70*l.* paid, (the money being the proceeds of the sale of her own lands), obtained from the defendant a lease of certain premises, to hold to her own use during her natural life, the defendant covenanting, at the expiration of her lease, to pay *Hannah Healey, heirs or assigns*, the sum of 50*l.*

Held per Cur.—That the plaintiff's remedy, if entitled to sue for the 50*l.*, must be under the lease in an action of covenant; and that having assented to the demise to his wife, he cannot now sue for the consideration money paid to the defendant for the lease, either as money lent, or as money had and received to his use.

Assumpsit for money lent, and money had and received.

Plea non-assumpsit and issue joined.

At the trial of this cause before Mr. Justice Sullivan, at the Autumn Assizes, 1850, held in and for the county of Prince Edward, a verdict was rendered for the plaintiff for 50*l.*, by consent, subject to the opinion of the court on the following facts and points:—On the 6th of September, 1842, the sum of 70*l.* was advanced, partly by a note and

partly in money, the respective accounts not being ascertained, by the plaintiff and his wife Hannah, to the defendant; the note was in the possession of the plaintiff's wife, and payable to bearer, and the money and note were the proceeds of her lands, which the plaintiff and she had sold during the coverture. Upon the advance of the note and money, the lease, hereinafter mentioned, was executed by the defendant and the plaintiff's wife; she died about the 19th of May, 1850, and before the commencement of this suit—the plaintiff and she being in possession of the land at the time of her death. The plaintiff and his wife were both present at the time of the advance of the 70*l.*, and the execution of the said lease; and the plaintiff is a subscribing witness to the memorial, which is dated the 11th of January, 1849. The lease is to the following effect:—
“Articles of agreement entered into 'at, &c., on the 6th of September, 1842, between the defendant of the first part, and Hannah Healey of the second part, witnesseth—that for and in consideration of the covenants and agreements thereafter mentioned, and which on the part of the said parties were to be kept and performed, the said defendant thereby covenanted and agreed to and with the said Hannah Healey, to lease and to farm let, and by these presents did lease and to farm let unto her the said Hannah Healey, the front of the east half of lot number 58, bay side Marysburgh; that is to say, so many acres, more or less, commencing at the water's edge, and running to the main road on the hill, with all the improvements thereon erected, *to her own use during her natural life*, from the date of these presents, *then to be fully complete and ended*; the said defendant reserving to himself, his heirs and assigns, two acres more or less, comprising the then piece of woods surrounding the school house, &c. The said defendant further covenanted and agreed to and with the said party of the second part, to allow her, the said Hannah Healey, to have the privilege of cutting as much firewood as she might require to keep her house comfortable during the said lease, to the extent of three acres, the same to be taken off the rear of the said lot, &c.; in consideration whereof the

said Hannah Healey pays to the said defendant 75*l.*, the receipt whereof is thereby acknowledged. And the said defendant thereby covenanted and agreed, at the expiration of this lease, to pay or to cause be by him or his heirs the sum of fifty pounds to the said Hannah Healey, heirs or assigns; otherwise, if the said Hannah Healey thinks proper at the expiration of six years from the date thereof, to give up the above mentioned premises to the said defendant, then the said defendant thereby covenanted to, and with the said Hannah Healey, to pay or cause to be paid unto her, or her heirs and assigns, the full sum of 70*l.*, by her, the said Hannah Healey giving to the said defendant 12 months' notice to that effect. In presence whereof the parties have hereunto set their hands and seals the day and date above written, in presence of

(Signed) D. M. WHIRTER.

(Signed)

JOHN BONGARD, [*L.S.*]

“

HANNAH HEALEY, [*L.S.*]

The verdict was taken, subject to be increased to the whole sum advanced and interest, if the court should be of opinion that the plaintiff was entitled to recover that amount; or to be entered for the plaintiff for the sum rendered (50*l.*); or to be set aside, and a verdict entered for the defendant, or a non-suit ordered at the discretion of the court, upon the facts admitted: all legal objections to be open to the defendant. A preliminary objection was taken at the trial respecting the sufficiency of a notice to produce, given by the defendant, and served the day before the commission day, and overruled before the facts as above stated, were admitted.

In Michaelmas term, 1850, cross rules were obtained:

1st. By the plaintiff's counsel, to increase the verdict to 104*l.* 9*s.* 8*d.*

2nd. By the defendant's counsel, for a non-suit or new trial.

Cause was shewn during the same term.

Campbell, for the defendant, contended, the plaintiff's only remedy, if he had any, was on the lease to his deceased wife; that, admitting his right to avoid it by his

dissent, he had not done so, but on the contrary had adopted it, and taken the benefit thereof by actual enjoyment under it, and cannot now, that she is dead, abandon it and recover back the consideration money which had been paid with his privity and consent, as having been advanced upon a void transaction and held to his use; much less could he treat it as money lent, having been in fact not lent, but paid as the purchase money of the lease, on the terms therein specified; further, that he has no beneficial interest in the money, even if recoverable under the lease, the covenant being to pay not the plaintiff, but to his wife's heirs; that the term heir is used to designate the person beneficially entitled thereto, and entitled her heirs accordingly; and that the reasonableness of the arrangement was obvious, from the fact, that the money in question was the proceeds of her land, which land would have descended to her heir, had she not sold it, wherefore it was right that the money itself should go to him after the other objects in view had been satisfied (1 P. & D. 360): that the plaintiff's only remedy is in covenant under the deed; wherefore as suing to get back the consideration money, by rescinding the lease, he is estopped by his privity and assent, as shewn by his witnessing the memorial, and enjoying under it; that he should sue under the lease either as in his own right by survivorship or as administrator of his deceased wife.—*Tait v. Atkinson*, 3 U. C. Q. B. 152: and lastly, that an unascertained portion of the amount advanced to the defendant was a promissory note, and not money.

Richards, for the plaintiff, contended that the transaction was really money lent, and the use of the premises granted in lieu of interest, and that therefore the verdict for 50*l.* may be allowed to stand. Upon the other points—whether he acquiesced in the lease, and so precluded himself from avoiding it in an action to recover back the consideration paid, or whether his only remedy was in covenant under the lease, either in his own right or as administrator of his wife, he was disposed to submit to the court, after mentioning some cases bearing upon the subject.—2 M. & S. 393; 2

P. W. 497; 6 Q. B. 937; 12 M. & W. 97; 4 M. & G. 389; 13 Jur. 874; Williams' Executors, 509, a covenant to pay A. or heirs the executors may sue; and see *ib.* 438, 910, 242; 11 M. & W. 5 & 142; 3 Mad. 133; 4 T. R. 616; 7 Q. B. 864; 5 C. B. 583; 3 Ex. R. 136; 18 L. J. Ex. 288; 12 M. & W. 855; 1 B. & B. 443.

Hill v. Saunders, 2 Bing. 112—wherein a lease by husband and wife, of the wife's land, and rent reserved to the wife's heir, it was held the husband surviving was not entitled thereto.—1 M. & G. 228; Crabb on Real Property, sec. 1430; F. N. B. 120; 1 Atk. 458; 1 B. N. S. 434; 11 Vin. Abr. 133, pl. 27; 3 Atk. 527; 2 Atk. 180.

Chattels real go to the husband surviving, not *jure uxoris*, but as a marital right, and he need not administer.—1 Rolls Abr. Baron and femme, H. 8; *ib.* 345, b. 10; Plow. 192; Dyer, 251, a; Gilb. R. 234; 1 Roper, 173; 1 Preston Ab. 343; *ib.* 332; Coot on Mortgages, 510; Co. Lit. 3 a, 46 b, 351 a; Vaughan 185; 2 Equity Ca. ab. 138; Aleyn. 15; 1 H. B. 535; 6 M. & W. 422; Hob. 3 & 204; Hut. 7; 1 Rusl. 1 to 72; Platt on Leases, 571.

MACAULAY, C. J.—It appears to me that the plaintiff's remedy, if entitled to sue for the 50*l.*, must be under the lease in an action of covenant. Whether such action can be brought by the plaintiff in his own name as a marital right by survivorship, or only as administrator to his deceased wife—and, in either event, whether the money, when received, could be held to his own use, or only in trust for her heir—it is not necessary at present to determine; for it seems clear that (however he may have dissented from the demise to his wife), he cannot, after having assented thereto, as proved at the trial, now exercise such right, and sue for the consideration money paid to the defendant for the lease, either as money lent or as money had and received to his use; consequently, that the rule must be made absolute for a nonsuit.

McLEAN, J.—On the 6th of September, 1842, 70*l.* was advanced, partly by a note and partly in money. Plaintiff and his wife Hannah Healey, who advanced the money, were present when the advance was made. The note was

in possession of Mrs. Healey, payable to bearer, the money and note advanced being proceeds of land of Mrs. Healey, sold by her after coverture. The lease put in was made to Mrs. Healey by the defendant, and executed by her and the defendant in presence of plaintiff. Plaintiff and wife went into possession under the lease of the premises mentioned therein, and remained in possession till her death, about the 19th of May, 1850. Plaintiff is a witness to the memorial of the lease, dated 11th January, 1849.

This action is brought to recover from the defendant a sum of money paid to the defendant by the plaintiff's wife, in his presence, in consideration of a lease made to her by the defendant, of certain premises in the township of Marysburgh, of which premises it is admitted plaintiff and his wife obtained possession, which they held up to the death of the lessee.

The declaration is for money lent to the defendant, for money paid by the plaintiff to defendant's use at his request, for money received by the defendant to the use of the plaintiff, and for money due to the plaintiff on an account stated.

A verdict was taken by consent for plaintiff, and 50*l.* damages, subject to the opinion of the court as to the right of the plaintiff to recover in this action on a certain statement of facts agreed upon.

On these facts, I am of opinion that the plaintiff cannot sustain this action. By the lease put in, which was made by defendant to the plaintiff's wife, and with his assent, it appears that the defendant received a sum of 70*l.* as the consideration for that lease: that the plaintiff's wife, and, of course, the plaintiff, were entitled to enjoy the premises leased during the lifetime of the wife, if desired; but that if the premises were surrendered at the end of six years, the consideration received was to be refunded by defendant on receiving twelve months' notice—if held during the lifetime of the wife, then 50*l.* to be refunded. The money having been received by the defendant under the lease as the consideration for the demise, would clearly belong to the defendant, having in fact been paid to him by the plaintiff, through his wife, who must be taken to have acted as his agent and

for his benefit, if there were no stipulation in the lease that under certain circumstances the whole amount or a portion of it should be repaid. The lease, then affords the only proof of the defendant's obligation to repay any portion of the money; and the plaintiff cannot, after enjoying the full benefit of the lease during his wife's lifetime, treat the payment of the consideration given for it as a payment or an advance of money on any other account.

The lease shews that the money was not *lent* to the defendant, nor paid to his use, except for a consideration; nor was it received by defendant to the use of the plaintiff, for it was received to his own use for a good consideration, which plaintiff, through his wife, received and enjoyed; and there is no account stated from which an implied promise to pay the plaintiff on request will arise: it is the lease only on which the defendant's liability rests, and on which it must be enforced.

A recovery in this action could not be a bar to an action by the representative or administrator of Mrs. Healey, on the agreement contained in the lease to repay a part of the money paid originally as the consideration for such lease; and that fact, I think, shews conclusively that this action, on the common counts, cannot be sustained.

SULLIVAN, J., concurred.

BROCK v. RUTTAN, SHERIFF.

The defendant in this suit, as sheriff, by his deputy, having levied under a *fi. fa.* on twenty-five shares of the stock of the Bond Head Harbour Company, in the books of the said company appearing to be the property of W. H. B.; and having written to the plaintiff in this suit to say that he had done so, afterwards returned the writ *nulla bona*: *Held*, that the said shares not having been transferred in the registry books of the company kept for that purpose, were at the time of the said levy in the order and disposition of the said W. H. B., and liable to execution as being his property and did not pass to the trustees of the said W. H. B. under a deed of assignment to them—sixteen shares of the stock of the Bond Head Harbour Company being specified in the second schedule attached to said deed and a clause being at the bottom in these words—“and all other goods, chattels and personal estate of the said W. H. B., where-soever situate.”

Held also, that the said Bond Head Harbour Company stock was personal property of the debtor, and liable to be seized and sold under an execution against him, and therefore that the return made by the sheriff was untrue.

The first count of the declaration alleges the issue of a writ of *fi. facias*, at the suit of the plaintiff to the defen-

dant, against the goods and chattels of William H. Boulton, under which he seized and took in execution divers goods and chattels of the said Boulton, and levied the amount endorsed ; yet that he had not the money ready, and falsely returned " no goods."

Plea 1st.—That he did not seize or take in execution any goods and chattels of the said Boulton, *modo et forma* ; concluding to the country.

Plea 2nd.—That he did not levy the moneys endorsed on the said writ of *fiery facias*, or any part thereof, out of the said goods, or out of any goods of the said Boulton ; concluding to the country.

At the trial of this cause, at the autumn assizes of 1850 for the county of York, before Mr. Justice Burns, the plaintiff proved—

1st.—A writ of *fiery facias* against the goods and chattels of William H. Boulton, at his suit, for 76*l.* 15*s.*, directed to the sheriff of the united counties of Northumberland and Durham, the defendant in this suit, returnable the first day of Easter term then next, issued the 5th of March, 1850, endorsed to levy 66*l.* 10*s.* damages, and 10*l.* 5*s.* costs and interest, fees, &c., marked "received 6th March, 1850," and returned " no goods." 2nd. That the number of shares in Mr. Boulton's name in the books of the Bond Head Harbour Co., (situated in defendant's bailiwick), was fifty-five, on which 343*l.* 16*s.* 10*d.* were paid ; and that such shares were never transferred by him on the books. 3rd. A letter from defendant's deputy to plaintiff and his partners, dated Cobourg, March 15, 1850, stating that he had seized twenty-five shares in the Bond Head Harbour stock of Mr. Boulton, of 6*l.* 5*s.* each on 343*l.* 16*s.* 10*d.*, with 8 per cent., payable "to-day," on the stock ; and that he had advertised them for sale on the 19th of March instant, when he trusted they would have some one in attendance. 4th. That a person named Mac-Naughten bought the shares at 2*l.* 1*s.* per share ; that the deputy sheriff transferred them to him on the books, and that the purchaser had since transferred them to others ; the proceeds of the sale being 112*l.* 15*s.* The secretary of the company, who produced the books, could not tell whether

Mr. Boulton ever accepted any stock or transfer of shares, not being secretary at the time, but stated that by the transfer book Charles Clark had transferred 350 shares to him at one time, but that Mr. Boulton had transferred some. 5th. A letter from the defendant to the plaintiff.

For the defendant, *M. C. Cameron* objected that the case was not made out on the grounds—

1st. That the writ was not shewn to have been returned by any one having authority, nor was it shewn that Fortune was the deputy sheriff. 2nd. That it was not shewn that W. H. Boulton had any stock while the writ was current in the defendant's hands, or that he (Mr. Boulton) had ever accepted any stock, so that any could be sold. 3rd. That there was not sufficient proof of any amount of stock standing in his name, and that it should be shewn under the seal of the corporation.

These objections were overruled, when the defendant's counsel put in an assignment in trust of W. H. Boulton to Messrs. Harris, Murray, and Wakefield, dated the 31st of March, 1848, the execution whereof was admitted. It was then contended that this deed had transferred all the stock in question before the issue of the plaintiff's writ, and that although in the schedule therein referred to only sixteen shares are specified, still the general clause at the foot of such schedule embraced all he had, if he was then the owner of more than sixteen shares. The material parts of the deed of assignment are the following :

It recites that Mr. Boulton was possessed of and entitled to the several lands, &c., in the first schedule thereto annexed, and of divers leasehold lands and securities, personal and chattel property, in the second schedule thereto annexed; and then assigns all and singular the said leasehold premises, properties, securities, personal and chattel property in the said second schedule mentioned, upon trust, &c. The second schedule contains sixteen shares of the Bond Head Harbour Company stock—100*l.*—and at the bottom is added, “and all other goods, chattels and personal estate of the said William H. Boulton, wheresover situate.” It was admitted that neither Mr. Boulton nor his trustees

had claimed or received the dividends that had been declared since the assignment—viz., three half-yearly dividends. The learned Judge who tried the cause, ruled that it required a transfer in the books of the company in order to vest the stock in Mr. Boulton's trustees; and that in the absence thereof, the defendant's vendee acquired the right and title thereto, and was entitled to dividends and liable for calls; and under his directions the jury found for the plaintiff \$83*l.* damages. In Michaelmas term last, *M. C. Cameron* obtained a rule calling on the plaintiff to shew cause why such verdict should not be set aside, and a new trial be granted, as being contrary to law and evidence, and for misdirection.

Cause was shewn by *J. H. Cameron*, Q. C., during the same term. The points made at the argument were—

First, whether Bond Head Harbour Company Stock was liable to be sold under a *fi. fa.* against goods and chattels; and if so, secondly, whether the assignment transferred to the trustees the stock afterwards sold by the defendant's deputy—in which event the return made would be justified, unless the defendant was concluded by the steps he had taken, and the letters written, and the receipt of the purchase money.

The plaintiff's counsel contended that the defendant had made the money, and could not afterwards withhold it and return "no goods."—*Brownlow*, 50; 3 Jur. 162; 5 Co. 91; *Mod.* 668; *Cro. Eli.* 908; *Dalton*, 350.

As to the first point, he contended that it had not been taken at *Nisi Prius*, and that the statute 2 Wm. IV. ch. 6, in connection with 1 Vic. ch. 31, ss. 8, 10 & 12, made Bond Head Harbour stock personalty for the purposes of sale in execution, and liable to be sold as goods and chattels under a writ of *fi. fa.*—1 Deacon & Chitty, 411; *ex parte Lancaster Canal Co.*, *Mont. & Bli.* 94. And upon the second point, that at the utmost only sixteen shares could have passed under the assignment; because that number being specified, excluded the inference that any Bond Head Harbour Company stock was intended to be included in the general clause, and that the defendant had sold fifty-five

shares.—Doe Meyrick v. Meyrick, 2 C. & J. 223; Payler v. Homersham, 4 M. & S. 423. But that even sixteen shares did not pass, for want of transfer on the company's books, and acceptance thereupon by the trustees.—1 Vic. ch. 31, sec. 10. That registration on the books was essential.—Midland Great Western Railway Co. v. Gordon, 16 M. & W. 804; Brown v. McMillan, 6 M. & W. 200; 7 Q. B. 27; 9 Q. B. 199; 3 Mont. & Ayr. 224.

The plaintiff's counsel submitted, that if the defendant's acts and letters constituted *prima facie* evidence against him, it was for him to rebut them by shewing that Mr. Boulton did not own the stock, which he had not done; and that the plaintiff had sufficiently shewn that he did hold it in the absence of anything to the contrary.

M. C. Cameron, in reply, contended, 1st, That the first point was fatal; that although the stock was saleable as personal property, it was not so saleable as goods and chattels; and if not, that the defendant had not made the money thereout, but had committed a wrongful act, for which he was responsible to others than the plaintiff; that his letters were only *prima facie* evidence, and might be explained away. 2ndly, That the assignment, in its comprehensive terms, embraced all the effects of the assignor, including the stock in question if he really owned it, which was not sufficiently shewn at the trial. He cited 3 M. & G. 399; Heenan v. Evans et al. 11 A. & E. 539; Wentle v. Freeman, 3 Taunt. 256; Dawson v. Wood, and others.

MACAULAY, C. J.—The statute 1 Vic. ch. 31, sec. 10, provides for the number and value of shares in the capital stock of the Bond Head Harbour Company, and enacts, "That the shares of the said capital stock may, after the first instalment thereon has been paid, be transferred by the respective persons subscribing or holding the same to other persons, and such transfer shall be entered or registered in a book to be kept for that purpose by the said company." The first question in order is, whether the shares sold by the deputy sheriff belonged in point of law to Mr. Boulton or his trustees at the time. No mention is made of the share certificates, if any, nor whether delivered over to the assignees of

Mr. Boulton or not; nor is there any proof of the latter ever did, or do now intend or desire to claim the shares, any further than their assent to become assignees of sixteen shares is involved in their acceptance and execution of the trust deed. It appears to me, however, that until the transfer shall be entered or registered in the proper book of the company (which probably cannot be done but at their request), the stock remains in the order and disposition of Mr. Boulton, and liable to execution as being his property; for, as said by Lord Lyndhurst, in *ex parte* Lancaster Canal Company, 1 Deacon & Chitty, 411; Mont. & Bli. 94, S.C., there seems, as far as the public (or, it may be added, the company) are concerned, to have been no alteration in the apparent situation of Mr. Boulton; and the transactions which took place between him and the assignees in trust did not at all vary his apparent situation, for he was still on the books of the company as a proprietor. He had the order and disposition of this property as the apparent owner, within the meaning of the Bankrupt Act 6 George IV. ch. 16, sec. 72, so far as that circumstance goes to shew it liable to execution. He continued the registered owner.—3 Mont. & Ayr. 224, *ex parte* Vallance; 2 Mont. & Ayr. 348, *ex parte* Watkins, reversing S. C. in Mont. & Ayr. 689; 3 Mont. & Ayr. 477, *ex parte* Bignol as to the importance of notice to the company; 2 Mont. & Ayr. 209, *ex parte* Masterman; Cumming v. Prescott, 2 Y. & C. 488.

In *Midland Railway Company v. Gordon*, 16 M. & W. 807, Parke, B., said, "All that the purchaser took by the sale to him of the scrip certificates for shares was an equitable right to have his name entered in the register as a shareholder. If he so register his name, then he is the shareholder;" and *Foster v. Bank of England*, 8 Q. B. 689.

This renders it unnecessary to consider whether, if the assignment passed sixteen shares, it also operated to pass the residue; upon which point the cases *Payler v. Homersham*, and *Doe Meyrick v. Meyrick*, were cited.

The next question is, whether the stock was saleable and transferable under the *fi. fa.* against goods and chattels. The statute 2 William IV. chapter 6, reciting the expe-

diency of the stock held by individuals either in banking institutions or in other companies lawfully created, and having a joint transferable stock, being subject to be taken and sold in satisfaction of debts, in the same manner as other personal property, enacted that the stock held by any person in any bank or in any corporation or company having a joint transferable stock, should be liable to be taken and sold in execution in the same manner as other personal property of the debtor; and by sec. 2, that it should and might be lawful for the cashier of any such bank, or for the proper officer of any other such corporation or company, upon the production of a certificate under the hand and seal of office of the sheriff acting upon any execution, declaring to whom any stock taken upon such execution should have been sold by him, to transfer such stock from the name of the original stockholder to the name of the person or persons who might be named in such certificate as the purchaser or purchasers under such execution; and that such purchaser or purchasers should from thenceforth be entitled to receive all dividends and profits arising from such stock, and should in all other respects be considered in the place and stead of the former stockholder.

The statute 12 Victoria, ch. 23 (passed 30th May, 1849), reciting the expediency of making better provision for the seizure and sale of the shares and dividends of the stockholders of all incorporated companies, enacted that all shares and dividends of stockholders in incorporated companies should be held, considered and adjudged to be personal property, and should be liable as such to *bona fide* creditors for debts, and might be attached, seized and sold under writs of execution issued out of any of her Majesty's courts in this province, in like manner as other personal property might be sold under execution; and then provided for the due notice of sale to the company, and for the transfer of the shares accordingly. Section 2 provides for the manner and form of seizing stock and dividends; and after other provisions, not necessary to be noticed, the concluding clause clearly extends it to embrace among others the Bond Head Harbour Company.

The statute 13 & 14 Victoria, chapter 21, sec. 26, repeats the liability of bank stocks.

It is said that under a bequest of goods and chattels generally, choses in action, bank notes and leaseholds will pass (1 P. W. 267 ; 3 Atk. 232 ; 3 Wood 301 ; Swinburne, 927 and sequel ; Cro. Els. 387 & 144 ; Preston on Legacies, 169) ; also a general residue, as extending to all the personal estate.

1 P. W. 267.—Lord Chancellor Cooper said, these words, “all his goods,” seemed at common law to pass a bond, and to extend to all the personal estate.

3 Atk. 228 *ib.* 72 ; Critchen v. Symes, S. P.—*Omnia bona sua*, both by the civil law and law of England, will pass the whole.—11 Ves. 666.

In Comyn's Digest, Execution C. 4, it is laid down that nothing can be taken in execution under a *fi. fa.* against goods and chattels, that cannot be sold ; but stock like the present may now be sold as personal property. In England, the statute 1 & 2 Victoria, chapter 110, section 12, extended the old remedy to money, bills of exchange, promissory notes, bonds and bank notes ; but as to government and other stocks, it makes special provision for charging the same in favour of judgment creditors ; but whatever is thereby authorized to be seized, &c., may be taken under a *fi. fa.* against goods and chattels.—Harrison v. Paynter, 6 M. & W. 387 ; 8 Dow. 169 ; 9 Dow. 914 ; Gaters v. Medeley, 6 M. & W. 425 ; 1 Dea. & Chitty, 411, *ex parte* Lancaster Canal Co.

It appears to me the correct construction, to hold that the words “goods and chattels” in a *fi. fa.* include all personal property liable to be seized and sold under an execution, and therefore warrant the sale of stock as being personal property of the debtor, and liable to be seized and sold under it ; consequently, that the return made by the sheriff was untrue, as he had levied the amount endorsed, and therefore that the rule nisi must be discharged.

As to the other points, it appears to me that the deputy sheriff was competent to act in the seizure and sale of the stock, and return of the writ, on the defendant's behalf, and

that there was sufficient proof of Mr. Fortune being such deputy, and authorized as such accordingly. I think also it sufficiently appeared that Mr. Boulton was holder of the stock in question, as against the defendant, who seized and sold it. He appeared to be the owner on the books of the company, and the sheriff's vendee has been recognized and substituted in his place. I do not think proof of his being the holder of such stock required to be given under the seal of the company; the usual course seems to be by the assignments and transfers in their books.—*Hare v. Waring*, 3 M. & W. 362; *Davis v. Bank of England*, 2 Bing. 393, 403; *Coles v. Bank of England*, 10 A. & E. 437; *South Hampton Dock Co. v. Richards*, 1 M. & G. 448; *London Railway Co. v. Freeman*, 2 M. & G. 606.

The act does not require the registration of stockholders to be verified under the seal; and in the absence of anything to impeach the *prima facie* right of Mr Boulton to be regarded as the owner appearing on the books of the company, the only source of information open to the defendant, (or the plaintiff, for all that I see), I think the stock must be considered his.—*Foster v. Bank of England*, 8 Q. B. 689; 2 Camp. 452; *Harris v. Loyd*, M. & W. 432; 9 L. J. 95, Ex.

MORRISON V. CARRALL, SHERIFF OF OXFORD.

A. having certain goods on hire for a term, belonging to B., and the defendant as sheriff having notice that the goods were the property of B., sold them under an execution against A. *Held*, that B. could maintain an action against the sheriff, the sale by him and subsequent sale by his vendees being a complete conversion, although the goods were afterwards left in A.'s possession.

The declaration contained two counts—the 1st stated that the plaintiff was owner of certain goods which were let to hire to A. for a term unexpired; that the defendant intending, &c., while the goods were in the possession of A., and the reversionary interest therein remained in the plaintiff, seized the goods and absolutely sold the same and converted and disposed thereof to his own use. 2nd count in trover.

Held, that the 1st count was good, and that there was no misjoinder.

Declaration dated 6th September, 1850.

The first count states that the plaintiff was owner of certain goods (enumerated), which had been and were let to hire to one John Milmine for a term unexpired, who was possessed thereof—the reversionary estate and interest therein belonging to the plaintiff; yet the defendant, well knowing, and wrongfully intending to injure the plaintiff in

his said reversionary property, estate and interest, while said goods were in possession of said Milmine as aforesaid.—to wit, on, &c.—seized and took the said goods from and out of the possession of the said Milmine, and absolutely sold the same, and converted and disposed thereof to his own use; whereby plaintiff is injured in his reversionary property, estate and interest of and in the said goods.

2nd. Trover.

Pleas.—1st. Not guilty.

2nd (to first count). That plaintiff was not owner of the said goods, or any part thereof; nor did the said supposed reversionary property or interest therein belong to him in manner and form alleged, concluding to the country and issue.

3rd (to the second count). Plaintiff not possessed as of his own goods, *modo et forma*, &c.

The case was tried before Mr. Justice Draper, at the last assizes held in and for the county of Oxford. The plaintiff proved, first, a bill of sale not under seal, dated the 18th October, 1849, whereby John Milmine, in consideration of 18*l.* 8*s.* to him paid by plaintiff, the receipt whereof is thereby acknowledged, granted, bargained, sold and confirmed unto the said plaintiff all and singular the goods and chattels mentioned in the schedule thereto annexed; then being in and about the dwelling house and premises of the said Milmine in Burford, to have and to hold, &c., to plaintiff, his executors, administrators and assigns forever, freely, quietly, peaceably, and without contradiction or disturbance of any person, and without any account to him rendered; adding general words rendering the instrument absolute in the strongest terms, and declaring that a table had been delivered in the name of the whole. The schedule contains one set of dining tables, 9*l.*; one bureau, 2*l.* 10*s.*; one cooking stove, 5*l.*; one cow, 2*l.* 10*s.*; two clocks, 2*l.*; two beds and bedding, value, 1*l.* 8*s.*

2. That the plaintiff held a note against Milmine, to satisfy which the goods were assigned. It was payable to one Osborne, who had transferred it to Werner, who transferred it to plaintiff, who delivered it up to Milmine.

3rd. That after the sale, Milmine proposed to rent the goods for one, two or three months, or a year, at a rent equal to 12 per cent. on the debt, to allow for wear and tear ; on which terms they remained in his possession, not leased for any particular time ; but it was in evidence that Milmine had paid the rent, or part of it.

4th. That afterwards Grey, who was said to be the defendant's deputy, and so acted in January and March last, and before and since, levied on these things, left them in the house for some time, advertised them, postponed the sale, and afterwards sold them, except the cow ; but that a part only had been taken away—namely, one bed and bedding, three beds having been sold. That one Tripp bid off most of the things, and sold them to another person, who afterwards went to Ireland, leaving the things in Milmine's possession. Milmine's wife stated she had no doubt but that the bed removed was one of those assigned to plaintiff.

For the defendant it was objected—

1st. That the evidence was insufficient to render defendant liable for Grey's acts, though he was deputy sheriff.

2nd. That no injury was proved to the plaintiff's rever-
sionary interest.

3rd. That Milmine was only tenant at will, which tenancy was put an end to by the seizure, and trespass the proper remedy.

4th. The assignment to plaintiff fraudulent.

The learned judge overruled the first three objections, contending that there was evidence sufficient to go to the jury as to one bed at any rate, and that case was a proper remedy. The fourth he left to the jury, instructing them to determine—

1st. Whether there was a *bona fide* consideration.

2nd. Whether it was the honest intention of the parties to change the right of property.

3rd. That the possession continuing with Milmine was indicative of fraud, but evidence only, to be weighed by the jury, and to find for defendant if they determined against the bill of sale ; but if they deemed it valid, then to enquire if the defendant or his deputy had sold any goods the pro-

perty of plaintiff, and in which he had reversionary interest; and if so, then whether they had been taken away by the purchaser from Milmine's possession, so as to deprive the plaintiff either of his claim for rent, or to deprive him of the means of resuming possession at the expiration of the term; and in either event to give damages proportioned to that injury—directing them on the authority of *Henderson v. Moodie*, 3 U. C. R. 348, that for the mere act of selling, so long as the possession remained in the plaintiff's tenant, the plaintiff was not entitled to recover, although the learned judge doubted the decision.

The jury found for the plaintiff—14*l.* 13*s.* damages.

In Mich. Term, 14 Vic. *Hagarty*, Q. C., for the defendant, obtained a rule calling on the plaintiff to shew cause why such verdict should not be set aside, and a new trial be granted, as being against law, evidence, and the judge's charge, and for misdirection; or to arrest judgment for misjoinder, or because the first count is bad in law.

John Wilson, for plaintiff, shewed cause during the same term, contending—

1st, That case does lie for injury to the reversion in goods and chattels.

2nd, Not only as to those goods actually removed, but for the mere act of wrongfully seizing and selling, as in evidence—that a seizure by the sheriff, followed by a sale, divested the property—at all events was a disturbance of the possession, and such an injury to the title that it necessarily affected the plaintiff's interest as well as the tenant's.

3rd, That at all events some things were removed, and that for so small a verdict a new trial would not be granted, even if it exceeded what the court might think the evidence fairly warranted.—*Jenkins v. Cone*, 1 A. & E. 272; note to *Fraser v. Swansea Canal Co.* 1 A. & E. 354; *Park, J.*—"If the sheriff sell more than the tenant's interest," 1 *Pearson's Ch. Forms*, 610.

4th, That whether a colourable sale from Milmine to plaintiff was a separate question: that, treated as a lessee, the sale must be adopted as good, and the plaintiff's case the same as if his title was unexceptionable: that there

was no misjoinder, and that the first count was clearly good.

Hagarty, Q. C., for defendant, contended—

1st, That the first count was bad, because it shewed no damage or injury; that damages cannot be inferred in law from the mere selling, without any dispossession of the tenant or other act of interference superadded.

2nd, That the defendant was empowered to sell the lessee's interest, whatever it was, and could have therefore disposed of some interest rendering it legal, but no more than Milmine's interest to render it illegal by construction.

3rd, That trover would not lie, owing to the plaintiff's not being entitled to possession at the time, and that nothing occurred affecting his ulterior interest.—1 M. & S. 234.

4th, That a subsequent removal by the purchaser was the vendee's act, and not the defendant's, who is not shewn to have made any actual delivery, or done anything inconsistent with a mere sale of Milmine's interest, whatever it was, and which he had no means of ascertaining beyond what his possession, &c., imported.

5th, That there was no proof that the bed removed was one of those claimed by the plaintiff, whereof it may have been a bed of Milmine's not assigned to the plaintiff.

MACAULAY, C. J.—I do not find anything to shew that the defendant's deputy had an execution against Milmine's goods, though there is in the notes of evidence, allusion made to a design to defraud one Babcock. The case seems to have proceeded as if the defendant's right to seize and sell Milmine's goods under a writ of *fi. fa.* was either proved or admitted. It was the most favorable course for the defendant; and the jury must be taken to have affirmed the sale to plaintiff, and subsequent lease of the goods to Milmine, although no specific term was proved, or else have disaffirmed the lease and regarded the goods as absolutely belonging to plaintiff, who in that event would be entitled to recover under the second count: indeed the plaintiff's reversionary interest has not been questioned in the argument. It is therefore to be regarded as the case of a landlord having leased goods and chattels; which

goods, during the tenancy and possession of the tenant, were seized by a sheriff in execution, and afterwards sold to strangers, but without any actual removal of the goods, or dispossession of the tenant, or delivery to the purchasers, the principal portion at the time of action brought still remaining in the possession of the tenant, but a small portion having been actually taken away.

The case cited—Henderson v. Moodie, 3 U. C. R. 348—is not a decision that the action does not lie; for nominal damages were given, and the plaintiff had judgment, perhaps owing to the demurrers in that case. The language of the learned Chief Justice, however, in giving the judgment of the court, is certainly strong against any right of action when there has been a mere seizure and sale without more—treating the seizure as an injury only to the tenant, and the sale, as injuriously affecting the landlord's reversionary interest, inoperative and harmless.

No notice of plaintiff's title is proved to have been given to the defendant or his deputy.

Dean v. Whittaker, 1 C. & P. 347—case for injury to reversion of goods; lent for an unexpired term. The defendant's officers took the goods, when they were told they belonged to the plaintiff, and were only hired to the debtor. Afterwards plaintiff gave notice, and paid off the execution to redeem them, and no step whatever was taken for the sale of the goods. Abbott, C. J., said that, *prima facie*, the sheriff had a right to seize the whole of the goods entirely, as they ostensibly belonged to the tenant; and that if the plaintiff had apprised him of his special rights, he would have sold accordingly. Plaintiff non-suited, and the court of Queen's Bench afterwards on motion refused to set it aside.

Duffil v. Spottiswood, 3 C. & P. 435.—The sheriff had seized and removed the goods, and at the time of the trial they were in the hands of his broker; and the plaintiff having given no notice, was non-suited on the authority of the foregoing cases.—Farrant v. Thompson, 5 B. & A. 826; Gordon v. Harper, 7 T. R. 9.

A mere seizure of the goods, though followed by a removal only affecting the possession, to which the tenant is

entitled, would not seem to constitute any injury to the landlord's reversion for which he could maintain an action against the sheriff. It would not constitute a conversion for which he could maintain trover, and might be justified under the *fi. fa.* in an action of trespass brought by the tenant; and if the landlord gave no notice of his reversionary right, he could not complain of any injury thereto, so long as the goods during the subsistence of the hiring merely remained in *custodia legis* unsold.—7 T. R. 9, *Oakes et ux. v. Wood*; 2 M. & W. 791, *Lucas et al. v. Nockells*; 10 Bing. 157; *Price v. Peck*, 1 Bing. N. S. 387; *Wood v. Durrant*, 16 M. & W. 149.

But a subsequent sale by the sheriff of the whole interest in the goods, followed by a second sale by the defendant's vendee, as in evidence in this case, was a conversion of the entire property, although afterwards left or suffered to remain in the tenant's possession. The case cited, of *Jenkins v. Cone*, 1 A. & E. 372, in note to *Fraser v. Swansea Canal Co.* 354, is in point in support of this view.

I do not perceive any mention of notice of the plaintiff's claim having been given before the sale; but from what does appears, it is the reasonable inference, and the contrary has not been alleged. Assuming, therefore, that the defendant or his deputy had notice of the plaintiff's right, and afterwards sold the goods as the absolute property of Milmine, taking the assignment made by him to the plaintiff as fraudulent and void as against creditors, I think this action maintainable, certainly for the bed actually removed, and for the other articles also—the plaintiff by bringing this action, not seeking to disaffirm such sale, but upon recovering herein virtually confirming it.

The jury seem to have so regarded the case, and have given damages for the value of all the property accordingly.

That the sale was a conversion in law—*Foulder v. Willoughby*, 8 M. & W. 540; *Thorogood v. Robinson*, 2 Moore, 181: 6 Q. B. 769; 9 Jurist, 274; *Cooper v. Willionatt*, 1 C. B. 672; *Bradley v. Copley*, 1 C. B. 685; *Watson v. McGuire*, 5 C. B. 836, 841; 2 Saund. 47.

As to the motion in arrest of judgment, I think the first count good, and that there is no misjoinder.

SULLIVAN, J.—In the case of *Dean v. Whittaker*, 1 C. & P. 347, I find that an action in the form of the present one was held to be maintainable by Abbott, C. J. The plaintiff was however non-suited because a sale by the sheriff was not proved, but only a seizure. The ruling of the learned Chief Justice, was upheld by the court of Queen's Bench, as appears by the report in C. & P., not reported in any of the term reports—the Chief Justice saying in the course of the argument that there was no doubt but that the tenant of a chattel had an interest which may be seized and sold by the sheriff. The same doctrine was upheld in *Duffil v. Spottiswood*, 3 C. & P. 435; and 1 A. & E. 372.

I could understand the reasonableness of these decisions, if an absolute sale by a sheriff on execution against a tenant would pass an absolute property. In cases of sales under a void execution, or upon an execution upon a judgment afterwards reversed, the sheriff's sale has been held to pass property; but I do not find this to be the case when one man's goods are taken and sold on execution against another.

It is true that when a sheriff seizes, removes and sells goods belonging to one, on an execution against another, trover will lie, though the sheriff's vendee cannot defend his title against the rightful owner; but so it is in all cases when the goods of a person are wrongfully taken, the owner may elect to proceed against the first wrong doer or to dispute the title of his vendee; in the case of the sheriff, however, as in that of any other wrong doer who converts the goods of another, the whole proceeding is wrong. The present case is far different; the action is founded upon an injury to the reversion; the sheriff's seizure is rightful, because the interest of the tenant is subject to seizure, and the removal by the sheriff would be rightful for the same reason; the sale so far as it diverts the tenant's interest is also rightful; and the sale by the sheriff in law passes no more interest than the execution debtor has, though the sale be nominally of the absolute property. A sale by the sheriff of the tenant's temporary property would take the possession from the tenant as much as an absolute sale; and therefore it is not

easy to see how the reversion is more injured by the absolute sale than it would by the qualified one. I am not prepared however to contend against the high authority of Lord Tenterden, but I can only reconcile it with my own notions of law by supposing that, as in the case of an asportavit and sale by a wrong doer, the owner has his election to bring trover against the original wrong doer, thereby making good the title of his assignee, or against the assignee denying the effect of the assignment. So in the case of an absolute sale of goods, where the execution debtor has only a temporary interest the owner may elect to adopt the absolute sale as depriving him of his reversion and of the whole of his rights in the goods, or he may look to the possessor of the goods for his rents, and for a return of them when the term is at an end. If this be the law it is not inconsistent with justice; and taking it to be law, I am not for disturbing the verdict. The sale, however, would leave no room for the distinction taken by my brother Draper at the trial, between the goods removed in consequence of the sheriff's sale and those left in possession of the tenant, unless the leaving the goods in possession of the tenant is to be considered as an abandonment of any title acquired by the sheriff's vendee, and analogous to a return of the goods, by a defendant in trover, where the return after conversion goes in reduction of damages. If the tenant has become the tenant of the sheriff's vendee, the owner should have had his election to recover the whole value of his interest in the goods against the sheriff. If, on the contrary, the sheriff's vendees abandoned all title by the sheriff's sale, then the distinction of the learned judge would be right for the damages in regard to the goods, relinquished by the sheriff's vendee, should be only nominal.

The verdict is for a sum which may only have been intended to cover the value of the goods, removed by the vendees of the sheriff, and damages as to the remainder. It probably, however, was intended to include the value of the whole of the goods sold, and if so, I think it was right; and at all events so far as the defendant's claim to disturb the verdict goes, I do not think it would be proper to admit it.

The plaintiff, if the verdict does not cover the whole value of the goods, will probably have most reason to complain; for he may be considered hereafter as having received the whole value of his estate in the goods, and as thereby having established the right of the sheriff's vendees to the absolute property bought by them. The plaintiff does not however seek to set aside the verdict; and I am not called upon to anticipate any question which may hereafter arise between him and the vendees of the sheriff, or between him and the person to whom he let the goods on hire.

As regards the question of fraud in the plaintiff's purchase of the goods from the execution debtor, it was one for the jury, left to them with a proper charge from the court. If the jury had, under the evidence, pronounced the sale fraudulent, I should perhaps be quite as well satisfied with the verdict as with the one given; but I do not think the present verdict so contrary to evidence as to justify the sending the case to another jury, upon that question. I am of opinion that the rule should be discharged.

McLEAN, J., concurred.

HILARY TERM, 14TH VIC.

HARRISON V. HARRIS ET AL.

Where the plaintiff, at the request of A., the managing owner of a vessel, did certain repairs on the vessel, at the time not knowing that the vessel was owned by A. jointly with others—*Held*, that all the owners were jointly liable to the plaintiff for the said repairs.

This was an action against the defendants as owners of a propeller called "The Adventure," for repairs made by the plaintiff in the spring of 1849, at the request of one Jones, one of the defendants, as managing owner. The cause was tried before Mr. Justice McLean, at the winter assizes, 1851, for the county of York, when a verdict was rendered for the plaintiff for 28*l.* 15*s.* 7*d.*

The defendant Jones let judgment go against him by default; the other defendants pleaded—

1st. Non assumpsit. 2nd. Payment.

The plaintiff proved the repairs done at the request of Jones, against whom he had rendered his account, headed as against Jones, captain of the vessel. At the time the repairs were made, the plaintiff did not apparently know that the other defendants were joint owners with Jones, but afterwards discovered it. There was no doubt of the three defendants being the actual owners, and they were registered as such; but the defendants Harris and Sutherland rested their defence on the ground that the plaintiff had performed the work exclusively on the credit of the defendant Jones—wherefore they were not liable. The plaintiff contended that, as owners, all were *prima facie* liable on the doctrine of implied agency, and that such implication was not repelled by anything in evidence.

In Hilary Term, 14 Vic., *J. Duggan*, for defendants Harris and Sutherland, applied for a new trial on the grounds—

1st. That the verdict was against law.

2nd. For the reception of improper evidence.

3rd. For misdirection.

MACAULAY, C. J.—On referring to the learned judge's notes of the evidence, and the cases cited for the defendants, I do not see that the verdict is against law, or that improper evidence was received, or that there was any misdirection.

The cases (a) shew that joint owners are *prima facie* liable for repairs ordered by the ship's husband or managing owner, on the ground of an implied agency, unless something appears to rebut such inference. Several of the cases determine what will sufficiently rebut it; but where the joint ownership is not disputed, and there is nothing to exempt from liability by the terms of the contract or the

(a) *Reeves v. Davis*, 1 A. & E. 312; *Thompson v. Finden*, 4 C. & P. 158; *Curling v. Robinson*, 7 M. & G. 336; *Abbott on Shipping* (Perkin's edition), 32 and 40, and cases there cited; *Westerdell v. Dale*, 7 T. R. 306; *Johns v. Simons*, 2 Q. B. 425; *Harrington v. Fry*, 2 Bing. 179; *Harrington v. Fry*, 1 C. & P. 289; *Essery v. Cobb*, 5 C. & P. 358; *Thompson v. Finden*, 4 C. & P. 158; *Jennings v. Griffiths*, 1 R. & M. 42; *Briggs v. Wilkinson et al.* 7 B. & C. 30; *Meager v. Smith*, 4 B. & Ad. 673.

situation of the parties, I do not find that the mere circumstance of the plaintiff's having made out his account against the managing owner as captain, instead of against the owners generally or against the vessel, repels the implied agency, or shews a credit exclusively given to such captain or manager.

The defendants were jointly and beneficially interested, and were in a situation to reap the benefit of the plaintiff's work, and should therefore be jointly responsible.

McLEAN, J., and SULLIVAN, J., concurred.

Rule nisi refused.

GRANTHAM V. BISHOP.

B. having been served at Niagara with a subpoena issued by the clerk of the Assize and Nisi Prius, commanding his attendance at the assizes then sitting at Toronto, the subpoena having been tested on the 22nd of May, and commanding his attendance on the 6th of the same month of May—*Held*—1st, That the subpoena was invalid on the face of it, in being tested and served on a day after that on which the defendant was ordered to attend; and 2nd, That a subpoena issued by the Court of Nisi Prius, which is of local jurisdiction, is not binding out of the county where the court from which it issued is then sitting.

This action was brought for non-attendance of the defendant as a witness, he having been subpoenaed by a subpoena issued by the Court of Assize and Nisi Prius on the plaintiff's behalf, to attend the assizes at Toronto, and give evidence in a cause brought by the plaintiff against one Powell, against whom plaintiff alleged he had good cause of action, in which defendant was a material witness, and yet did not attend.

The defendant pleaded—

1st. Not guilty.

2nd. That no subpoena was shewn to defendant.

3rd. That no copy was served.

4th. Expenses not paid.

5th. That plaintiff had no cause of action against Powell.

6th. That no such subpoena issued.

7th. Leave and license.

8th. (Being the second plea demurred to.)

The plaintiff proved the entry of the Nisi Prius record in his case against Powell, containing several pleas, and its withdrawal on the 27th May, 1850; also, that the defendant was called.

The subpoena, when produced, was tested in the name of the Chief Justice of the province, the 22nd May, 1850, and signed by W. A. Campbell, C. A., addressed to the defendant, commanding his attendance before the said Chief Justice, assigned to hold assizes in and for the county of York, at the Court House in the city of Toronto, on the sixth day of May, 1850—the word “twenty-second” being struck through with a pen and “six” written in the margin—in the suit of the plaintiff against John Powell. The sixth was said to be the assize day; the subpoena was issued by the clerk of assize, and it had a plain seal in the upper corner.

There was evidence that in May last, long after the sixth, the plaintiff subpoenaed the defendant at Niagara, and paid him 10s. for expenses, when he was informed that if he attended on Monday (apparently the 27th) it would do, and that he prepared to attend. There was also evidence by two of the jurors in a former trial of plaintiff's case against Powell, that the defendant gave evidence which was material. It had relation to certain promissory notes, but none were produced on this trial, and there was no other proof of the plaintiff's cause of action against Powell.

For the defendant, it was objected—

1st. That the subpoena was not tested in term, and was issued by the clerk of assize.

2nd. Not tested in the name of the judge presiding at Nisi Prius.

3rd. Subpoenaed 22nd of May to attend on the 6th of that month.

4th. No proof that it was shewn to defendant.

5th. Ten shillings not sufficient.

6th. No sufficient proof of plaintiff's cause of action against Powell.

7th. That leave and license until Monday was proved.

8th. That defendant was subpoenaed at Niagara, out of the jurisdiction of the court.

9th. That the promissory notes should have been produced.

10th. That a jury was not empanelled, and the plaintiff had not other evidence sufficient.

11th. No proof of damage.

12th. Only horse hire—not promissory notes claimed in the particulars, &c.

The plaintiffs refused a nonsuit, and

BURNS, J., before whom the cause was tried, directed a verdict for defendant.

Strong, for defendant, applied to set aside the verdict as against law, evidence, and for misdirection, stating the main points for the decision of the court to be—

1st. Whether the subpœna served on defendant at Niagara, was binding on him.

2nd. Whether the want of proof that defendant's absence obliged the plaintiff to withdraw the record.

3rd. The inconsistency as to the day in the subpœna.

MACAULAY, C. J.—The present is an action on the case for the defendant's wrongful conduct in not attending, although bound to do so by virtue of the subpœna. It is not founded on any contract or promise to attend. No authority is cited to shew that the subpœna is valid in itself, or the defendant bound to obey it.

1st. I apprehend the subpœna is invalid on the face of it, it being tested and served on a day long after that on which the defendant was ordered to attend: to obey it was impossible.

2nd. A subpœna issued by the Court of Nisi Prius, which is of local jurisdiction, did not bind the defendant to obedience, served as it was out of the jurisdiction. The plaintiff should have obtained one from the Queen's Bench.

In England subpœnas of this kind are regulated by the statutes 38 George III., ch. 52, sec 4, and 45 George III. ch. 92, sec. 3—neither of which are in force here.

In this province, criminal subpœnas issued by courts of Oyer and Terminer, &c., are made binding in other counties out of the jurisdiction of the court, by provincial statute 9 Vic. ch. 35. And as to county courts, see stat. 8 Vic. ch 13, ss. 33 & 34; but these statutes do not embrace subpœnas in civil cases, issued by the Court of Nisi Prius.—1 Chitty Cr. Law, 509; 8 Ju. 758; 9 Ju. 111, 734, 1009; 12 Ju. 581; 13 Ju. 101; 2 Dow. N. S. 229.

10 M. & W. 15; Schweles v. Hilton, 7 M. & G. 958; Edgell v. Curling, 8 Scott, 663; Needham v. Fraser, 1 C. B. 815. With these formidable objections in the plaintiff's way, it seems unnecessary to consider the other points.

McLEAN, J., and SULLIVAN, J. concurred.

Rule nisi refused.

MILLER V. MILLER.

Appeal from the County Court of the County of Prince Edward—Assumpsit on the undermentioned promissory note, and on the account stated—Plea, set-off.

The plaintiff sued on a promissory note for 37*l.* 10*s.* At the trial B. the defendant, produced an account for 20*l.* 16*s.* 3*d.*, commencing in September, 1848, and ending January, 1850. The defendant also proved a receipt for 12*l.* 10*s.* The plaintiff then put in an annuity bond conditioned for the payment by the defendant to plaintiff, of 25*l.* per annum during his life, the 1st payment to be made on or before the 1st of June, 1846, and the like sum on the 1st of June in each succeeding year; a witness present proved the payment of the annuity for 1853, and that it consisted of items of an account, and was endorsed on the bond as one sum of 25*l.*, this evidence was objected to by the defendant's counsel, but admitted. The learned Judge of the County Court who tried the cause, told the jury "that from the evidence it appeared that more than 25*l.* was due on the annuity bond when the defendant's account was read over to the plaintiff; and that, in their opinion, the amount thereof was intended as a payment of so much on the annuity, the plaintiff had a right so to apply it; and in that case, not to allow credit for it against the note; but to deduct it if they thought there was no such understanding. As to the 12*l.* 10*s.*, that the plaintiff had endorsed it on the bond, and had a right to do so at any time, and that although it appeared to have been very recently done, that would make no difference." The jury found for the plaintiff the full amount of the note and interest. The defendant's counsel afterwards moved to set aside the verdict in the court below, as being contrary to law and evidence, the admission of improper evidence, and for misdirection, and the learned Judge refused the application. *Held* in appeal: That the learned Judge was not in error in leaving the case to the jury on the evidence as he did, and that the conclusions arrived at by the jury in relation thereto were right.

Appeal from the County Court of the county of Prince Edward. The plaintiff declared on a promissory note made by the defendant on the 11th of August, 1847, for 37*l.* 10*s.*, with interest from the 1st of June, 1848, payable to the plaintiff (not saying or order), on the 1st of June, 1849, and on an account stated.

The defendant pleaded a set-off of 50*l.* for work and labour, goods sold and delivered and money paid and had and received, &c.

At the trial the plaintiff put in the note.

The defendant produced an account for 20*l.* 16*s.* 3*d.*, consisting of various items, commencing the 25th September, 1848, and ending January, 1850. Most of the items

forming the account were charged in 1848. The defendant called a witness, who proved that at a period not stated the items were read over to the plaintiff, who was not heard to say anything against the account on cross-examination; he said he understood from the plaintiff that he had an annuity bond from the defendant, who was owing him that on account, and that the account read over to the plaintiff was to go against a debt due from the defendant to the plaintiff; but nothing was said of the annuity bond, and the witness knew nothing concerning it. The defendant also proved a receipt signed James Cook, dated the 26th July, 1849, for 12*l.* 10*s.* from the plaintiff on account, by the hands of the defendant. The plaintiff then put in a bond from the defendant to him, which was admitted. It was dated the 31st March, 1846, in the penal sum of 1500*l.*, conditioned among other things for the payment by the defendant to the plaintiff of 25*l.* yearly during his life—the first on or before the 1st of June, 1846, and a like sum on or before the 1st of June in each year afterwards. The following payments were endorsed thereon:—

1846, March 31st, 25*l.*, being the first annuity—*i. e.* to 1st June, 1846.

1847, August 4th, 25*l.*, being the second annuity—*i. e.* to 1st June, 1847.

1848, June 5th, 25*l.*, being the third annuity—*i. e.* to 1st June, 1848.

1849, July 26th, 25*l.*, on account of annuity, to 1st June, 1849.

The witness to the note declared on was then called, and stated that at plaintiff's request (not stating when) he went to defendant and said the plaintiff wished him to take back Gwillimbury farm, and gave his four notes for 37*l.* 10*s.* each, which notes the plaintiff told witness at the time were intended for his four daughters.

This witness was also present when the annuity for 1848 was endorsed on the bond, and said it was composed of sundry items of account, though endorsed as one item of 25*l.* This evidence was objected to by the defendant's counsel, but admitted. The learned judge who tried the cause

told the jury, that from the evidence it appeared that more than 25*l.* was due on the annuity bond when the defendant's account was read over to the plaintiff; and that if in their opinion the amount thereof was intended as a payment of so much on the annuity, the plaintiff had a right so to apply it; and in that case not to allow credit for it against the note, but to deduct it if they thought that there was no understanding. As to the 12*l.* 10*s.* that the plaintiffs had endorsed it on the bond, and had a right to do so at any time; and although it appeared to have been very recently done that it would make no difference. The jury found for the plaintiff 43*l.* 2*s.* 6*d.*, being the full amount of the note and interest.

The defendant's counsel afterwards moved to set aside such verdict, as being contrary to law and evidence, the admission of improper evidence, and for misdirection, or why it should not be reduced the full amount of the set-off proved, or reduced by deducting 20*l.* 16*s.* 3½*d.*, a portion thereof, or reduced by deducting 12*l.* 10*s.*, another portion thereof. In refusing the application, the learned judge of the County Court observed that it had been stated at the trial that one John McConnell was the real plaintiff, who had obtained the note from a daughter of the nominal plaintiff, and that such being the case he thought the jury were correct in rejecting the set-off as inapplicable to the case. That the defendant had credit for 12*l.* 10*s.* on the bond, and although so endorsed only a day or two before the trial, it made no difference.

That as to the 20*l.* 16*s.* 3¾*d.*, the witness proved it was to go against a debt, and although the annuity was not mentioned, yet it might be fairly presumed it was intended in the evidence.

That on the 1st of June, 1850, two years' annuity, or 50*l.* was due, and that the set-off, including the 12*l.* 10*s.*, only amounted to 33*l.* 6*s.* 3¾*d.*; that the plaintiff had a right to consider the several items of defendant's account as payments to him on account of what he owed him, and in the absence of any specific appropriation by defendant the plaintiff might apply them as such in payment of what was

due to him at the time; and that taking such view of the case, he perceived no misdirection, nor did he think the verdict contrary to law or evidence, but was quite satisfied it was according to the merits and justice of the case.

Eccles, for the apellant, contended the items proved constituted mere matters of set-off, and could not be applied by the plaintiff as payment to one debt more than another, without the consent of the defendant, and that the evidence did not warrant that inference as to either the sum of 20*l.* 16*s.* 3 $\frac{3}{4}$ *d.*, or to the sum of 12*l.* 10*s.*

Patterson, for the respondent, contended that the note really belonged to the husband of one of the plaintiffs' daughters, as the defendant well knew, and consequently, that the payments or items claimed by the defendant, as a set-off, were properly regarded as applicable to the annuity, and treated as payments rather than mere matters of set-off; that as to the 20*l.* 16*s.* 3 $\frac{3}{4}$ *d.*, there was evidence of such application by mutual assent sufficient to go to the jury; and as to the 12*l.* 10*s.*, that, though paid to Cook for the plaintiff, it was paid by defendant as a part payment of the annuity, as between the parties to the action—10 Ju. 26, and *Ketchum v. McGuire*, a former appeal in this court; and submitted that, being left to the jury on the whole evidence, the verdict was clearly warranted, and is consistent with the justice of the case.

MACAULAY, C. J.—As to the 20*l.* 16*s.* 3 $\frac{3}{4}$ *d.*, I certainly think there was sufficient evidence to go to the jury of the application thereof towards satisfaction of the annuity, and that it had been so applied, and I perceive no good reason to be dissatisfied with the opinion they expressed on the subject.

As to the 12*l.* 10*s.*, it was in the nature of the transaction as imported by the receipt, so much paid by the defendant to Cook for the plaintiff, but there is in the circumstances of the case much room to infer that such payment, as between the apellant and the respondent was made expressly with a view to the annuity, on which double that sum was due at the time it was made, and not a mere general advance of money, constituting a demand or set-off for so

much paid by the defendant for the plaintiff; that it was made in part payment of an existing debt under the bond, and therefore being absorbed thereby, never existed as an item of set-off against the note; and this although not endorsed on the bond until after the defendant's plea of set-off. The question was, whether it was advanced as part payment of the annuity, and the jury considered that it was. Further, if the 12*l.* 10*s.* was in fact paid by the appellant to Cook—not as money advanced for the respondent, but as payment of an account of a debt or debts due by the appellant to the respondent, either especially in relation to the annuity or generally without application to any specific debt—it was in the election of the respondent to apply it to whatever debt he pleased, and it appeared he did so. Beyond all this, the respondent would be entitled to a verdict on the plea of set-off; for the amount proved by plaintiff (33*l.* 6*s.* 3 $\frac{3}{4}$ *d.*) did not equal the note and interest, and those items could only have been allowed in reduction of damages, *pro tanto*; but I do not see that the learned judge was in error in leaving both branches of the set-off to the jury as he did, or that the jury came to erroneous conclusions in relation thereto; and, consequently, am of opinion the appeal should be dismissed, with costs.

McLEAN, J., and SULLIVAN, J., concurred.

RUTTAN V. PRINGLE.

The defendant in this suit, living in the county of York, received an anonymous letter dated 6th May, 1850, posted at Adolphustown, the place of residence of the plaintiff in this suit, informing him that the plaintiff had sold out and was going to leave the country in five or six weeks. The defendant, on the 24th June, 1850, without apparently making any enquiries in the meantime, arrested the plaintiff on a *capias ad respondendum*. *Held*, that the defendant had not good reason to believe, &c.

The declaration states that defendant, not having any probable cause or good reason to believe that the plaintiff was immediately about to leave Upper Canada, with intent and design to defraud the defendant of the debt afterwards mentioned, but maliciously intending to oppress, &c., and procure his arrest, &c., falsely and maliciously made an affidavit in the Queen's Bench, sworn at Oshawa, in the county of

York, on the 22nd June, 1850, before Richard Lee Holland, a commissioner duly authorized to take affidavits in the said court, whereby the defendant falsely and maliciously deposed and swore that the plaintiff was justly indebted to him in 50*l.* on two promissory notes of 25*l.* each and overdue, and falsely and maliciously swore that he had good reason to believe, and did verily believe, that the plaintiff was immediately about to leave Upper Canada with intent and design to defraud the defendant of the said debt; and that afterwards having caused the said affidavit so falsely and maliciously made to be filed in the said Court of Queen's Bench at Toronto, falsely and maliciously caused and procured a writ of *ca. re.* to be issued out of the said court at his suit against the plaintiff, directed to the sheriff of the united counties of Frontenac, Lennox, and Addington, for the arrest of the said plaintiff. That defendant further intending as aforesaid, and without cause, &c., maliciously caused the said writ to be endorsed for bail for 50*l.* by affidavit, and afterwards and before its return, caused and procured the said writ so endorsed to be delivered to the said sheriff to be executed; and afterwards and before return, defendant further contriving, &c., not having any probable cause or good reason to believe that plaintiff was then immediately about to leave Upper Canada, with intent and design to defraud the said defendant of the said debt, falsely and maliciously and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be arrested under the said writ, and to be imprisoned—to wit, for five days—until he gave bail, &c. Whereas in fact defendant, when he made such affidavit, caused the issue of the said writ, its endorsement for bail, delivery to the sheriff, and arrest thereunder, had not any reasonable or probable cause for believing, &c.; by means whereof, &c.

Plea—not guilty.

The cause was tried before Mr. Justice Sullivan at the autumn assizes, 1850, held in and for the united counties of Frontenac, Lennox, and Addington, when it appeared in evidence that the plaintiff lived in Oshawa and the defendant at Adolphustown. The copy of an affidavit was put

in by the plaintiff, admitted to be a copy of an affidavit filed in this cause, but not admitted to have been actually sworn. It purports to be the copy of an affidavit made by William Anson Pringle of the township of Whitby, teacher, the plaintiff in that cause, that Richard W. Ruttan, the defendant in that suit, was indebted to him in 50*l.*—that is, on two promissory notes for the sum of 25*l.* each and interest, and dated respectively the 30th October, 1846, payable to George Maniker or bearer two and three years after date respectively, and of which the defendant was the bearer; and that he had good reason to believe, and did verily believe, that the said Ruttan was immediately about to leave Upper Canada, with the intent and design to defraud deponent of the said debt. Signed W. A. Pringle, and sworn at Oshawa, in the county of York, the 22nd of June, 1850, before Richard Lee Holland, Commissioner &c. B. R., C. Y. The copy is endorsed “filed the 24th June, 1850, Charles C. Small,” and *præcipe* for *ca. re.*, &c. signed S. B. Fairbanks, attorney.

Bailable process had been served on the plaintiff at the suit of defendant, and a writ of *ca. re.* was admitted and a copy put in. It is tested the 24th of June, 1850, and issued out of the Queen’s Bench at Toronto, directed to the sheriff of the united counties of Frontenac, Lennox, and Addington, at the suit of the present defendant against the present plaintiff, by the name of William Anson Pringle, against Richard N. Ruttan. It was endorsed bail for 50*l.* by affidavit; and it was then proved that on this writ the plaintiff was duly arrested on the 28th of June in Adolphustown, at a militia parade, the defendant being present, having accompanied the deputy sheriff who made the arrest. The defendant shewed an anonymous letter to the deputy sheriff, which he said was his information, and offered five years’ further time to pay the debt if the plaintiff would give him security. The plaintiff was required to give bail; he said he could do so, but declined,—adding that he would make the defendant pay for arresting him; and he was taken to jail at Kingston, where he remained from the 28th of June until the 2nd of July, when he was liberated on bail.

Evidence was then given to shew the want of reasonable or probable cause that the plaintiff had property real and personal, was a man of family, a native of the country, and not likely to leave it, &c.

For the defendant it was objected, that the plea of not guilty, put in issue the making of the affidavit of debt as alleged, and that it was not sufficiently proved, and leave was reserved to the defendant to move on this ground.

It was then shewn that one of the plaintiff's bail, a brother, had taken counter security before going bail for him; that it was rumored a year previous that he had parted with his property; also that several persons spoke of his going to California. That the defendant had asked one John S. Hagerman to communicate to him if he learnt that the plaintiff was going away, and that a letter was brought to the post office at Adolphustown, which the postmaster, at the request of the bearer, directed to the defendant at Whitby. It is post-marked May 6th, 1850. The postmaster said he thought at the time it was John S. Hagerman who delivered it to him, but had reason afterwards to change his opinion. This letter was produced by the defendant; it is dated Adolphustown, May 6th, 1850, and it is as follows: "Mr. Anson Pringle—Sir—I take this opportunity to let you know that R. Ruttan has sold out and is going to California in five or six weeks; and if you have any demands on him you had better secure him in jail; for he has got the money, and he will pay it before he will lie in jail long, I remain yours"—the letter not being signed. It appeared that after the arrest the defendant had said he had spoken to one or two (Hagerman being one) to write to him if they heard of the plaintiff being about to sell his farm or to go away; that he had received the letter which influenced him; and that he only wanted security. Hagerman was called and proved that he had once gone to school to defendant, and had been asked by him in the summer of 1849 to inform him if he heard that the plaintiff was going away, but did not write the letter, though it is something like his handwriting. He had heard of plaintiff's going to California, but did not believe it, &c.

The case being left to the jury, they found for the plaintiff 100*l.* damages.

In Michaelmas Term, 1850, *G. Duggan*, jr., counsel for defendant, obtained a rule calling on the plaintiff to shew cause why a non-suit should not be entered pursuant to the leave reserved at the trial; or why the verdict should not be set aside and a new trial granted without costs, as being contrary to law and evidence; or why a new trial should not be had on the ground of excessive damages.

Henderson, for the plaintiff, shewed cause during the same term, he contended—

1st. That it was not necessary to prove the affidavit as being traversed and in issue, the plea of not guilty putting in issue only the want of probable cause and malice—referring to 3 Dow. 77; *Cook v. Dowling*, Bing. N. P. 14; *Long v. Lee*, 4 U. C. Q. B. 337; *Watkins v. Lee*, 5 M. & W. 270; *Lewis v. Alcock*, 3 M. & W. 188; 12 Ju. 600; 17 L. J. 96, 313.

2nd. That it was not necessary to prove it as evidence to connect the defendant with the wrongful act alleged, for his participation was clearly proved by other evidence.—5 D. & L. 509.

3rd. That the anonymous letter was entitled to no credit, was suspicious on the face of it, and however it might have excited enquiry, it constituted in itself no reasonable or probable cause for the defendant's believing the facts therein suggested.

4th. That the jury had found malice, and the defendant having failed to establish reasonable cause, &c., the damages were not excessive, but were for the jury exclusively, who shewed no undue feeling against the defendant.—7 Dow. 551. He also cited 7 U. C. Q. B. 197, *Doe ex dem. Burnham v. Siminous*, that the court would not non-suit, but may grant a new trial on terms, if the plaintiff should have proved the affidavit and failed therein.

G. Duggan, in reply, contended—

That the affidavit being averred, should be proved, and was not duly proved; that the plaintiffs should have shewn that the defendant made the affidavit, that the writ issued

thereon, and that the plaintiff was arrested under such writ at the defendant's suit—citing *Roscoe Evid.* 388; 14 *East.* 224, *Arundell v. White*; 2 *Moore*, 60, *Cashburn v. Reid*, sheriff; 1 *M. C. & Y.* 309, *Doe Rees v. Brown*: that the damages were excessive, the plaintiff's conduct equivocal, and the defendant justified in proceeding to arrest him.

MACAULAY, C. J.—As respects the allegation in the declaration that the defendant made the affidavit therein mentioned, the case of *Long v. Lee*, 4 *Q. B. U. C.* 377, shews that it is not the foundation or gist of the action; and if merely matter of inducement, it would not be traversed by the plea of not guilty.—*Petrie v. Lamont et al.* 3 *M. & G.* 702; 10 *Ju.* 1061; *Daniels v. Fielding*, 16 *M. & W.* 200; 11 *Ju.* 1024; *Watkins v. Lee*, 5 *M. & W.* 270; 12 *Ju.* 600; 5 *D. & L.* 509; *Holroyd v. Doncaster*, 3 *Bing.* 492.

But I do not think it necessary to go into this point, because I think the affidavit was sufficiently proved on the authority of *Fitzgerald v. Webster*, *Q. B. U. C.* 77, 2 & 3 *V.*, and other cases both in England and Upper Canada.—*M. C. & Y.* 383; *Spafford v. Buchanan*, 1 *B. & A.* 182; 2 *D. & R.* 127; *M. & M.* 109; 3 *Tyr.* 541; 14 *Bing. N. P.*; 2 *Mod.* 60; 7 *Ju.* 554; *Nicholson v. Coghill*, 4 *B. & C.* 216; *Cook v. Dowling*, 3 *Doug.* 75.

There cannot therefore be a nonsuit; nor am I prepared to say the verdict is contrary to law and evidence. It was for the plaintiff, in the first place, to give some sufficient evidence of the want of reasonable and probable cause and of malice. This the learned judge who tried the cause ruled that he had done. It was then for the defendant to repel the plaintiff's case by shewing the existence of such cause, or that he did not act maliciously. He placed much reliance on an anonymous letter; but the learned judge did not consider the receipt of such a letter, taken singly or in connection with the other evidence, sufficient proof of probable cause, and the case was left to the jury on the question of malice; and I cannot say that his view was incorrect, according to the case of *Delegal v. Highly* (3 *Bing. N. S.* 950.) It was incumbent in the defendant to prove not only the existence of facts, in themselves amount-

ing to reasonable and probable cause, but that he knew, believed in, and *bona fide* acted upon such facts. The existence of facts constituting probable cause and the defendant's knowledge thereof and acting *bona fide* thereon, should be separately considered—First, as to the existence of reasonable and probable cause in point of fact—the defendant, who lived at a distance from Adolphustown, proved in very general terms some vague rumours of the plaintiff being about to go to California; such rumours apparently having no foundation, and the authors of them, and on what grounded, not being shewn. So as to the plaintiff's disposal of his property, there was some evidence on that head, but it was a stale rumour of a like general and unsatisfactory character. The learned judge did not think such evidence specified enough to shew probable cause. Secondly, as to the defendant's knowledge thereof, there was no proof beyond the anonymous letter. This letter does not in itself constitute probable cause, being a covert communication not emanating from any avowed or responsible source; and however well calculated to put the defendant on further enquiry, it would never do to admit such suspicions and concealed representations to justify one man in arresting another. Had the defendant received a letter from a known reliable source, it would have been a different thing. The only value of this letter therefore is as the medium of communication by which the defendant became aware of the facts relied upon as probable cause. The evidence, however, was only of rumours or reports, whereas the letter positively asserts as facts what the defendant only proved to have been rumored. So far, therefore, as the defendant relied upon the letter in support of the facts, he failed to prove them, and must be regarded as having relied on false information, that ought not to have been adopted without corroboration or further enquiry. Hagerman, one of the defendant's witnesses, of whom he had long previously solicited intelligence, did not believe in the reports, and the defendant did not prove that after receiving the letter he appealed to him or to any one else on the subject. I apprehend, therefore, the case

depends upon the question of malice, as to which the jury find against the defendant with large damages. The facts favorable to the defendant were—the undoubted existence of the debt long over-due; that the defendant had, after much delay, sued the plaintiff by non-bailable process; that defendant had requested a person or persons living in the plaintiff's neighbourhood to apprise him if they heard of his selling his farm or being about to go away; that rumors of the kind had more or less prevailed; that he received the anonymous letter exaggerating the facts, such as they were; that he was resident at a distance, had shewn no previous disposition to oppress, and did not act hastily on such letter, although he had evidently a distrust of the plaintiff long before; and that after being arrested, the plaintiff's friends shewed hesitation in becoming bail for him without security. What operated against him was, that after receiving such letter early in May, he seemed to have taken no steps against the plaintiff until the 24th of June, a period corresponding in time with that stated in the letter, when the plaintiff was going to depart—namely, five or six weeks: that he did not in the interim take any trouble to find out what truth there was in such a letter, though the time was ample; and that he thus gave ground for the suspicion that if the letter itself was not written in collusion, he had purposely delayed acting upon it till the period of five or six weeks therein mentioned had expired, which was not the course that one acting *bona fide* would probably have taken. It cannot therefore be said that the verdict is against law and evidence. The defendant failed to prove that he had in fact *good reason to believe*, &c., or that he acted *bona fide* and without malice in acting as he did. But as the damages are large, and as many of the circumstances are calculated to repel the inference of malice, I think it is a fit case in which to grant a new trial on payment of costs, principally on the ground of the largeness of the damages.

McLEAN, J., and SULLIVAN, J., concurred.

Rule absolute for new trial on payment of costs.

CLEAL V. ELLIOTT AND BEARD, EXECUTRIX AND EXECUTOR
OF ELLIOTT.

Assumpsit on a promissory note made by defendant's testator.

The declaration stated that the testator—to wit, on the 19th of February, 1847—made his promissory note for 860*l.*, payable to Daniel Cleal or order, and delivered it to Daniel Cleal, “who then endorsed the same to the plaintiff;” that after the making, and before the note fell due, testator died, whereby defendants, as executrix and executor, became liable to pay the amount, according to the tenor and effect of the note—concluding with a promise by the defendants, as executrix and executor, to pay the plaintiff.

The defendants pleaded, 2ndly, That defendants did not promise in manner and form, &c., concluding to the country.

3rdly. That the note was made for the accommodation of Daniel Cleal, without consideration, and that the endorsement by Daniel Cleal to the plaintiff was without consideration, and that the plaintiff had always held the same without any value or consideration—verification. 4thly. The same as the third plea, with an averment that the endorsement to the plaintiff was after the note had fallen due. 5thly. That the note was procured by fraud of the payees, and others, and that it was endorsed to the plaintiff with knowledge of the fraud—verification. 6thly. The same as the 5th plea, with an averment that the endorsement to the plaintiff was after the note had become due—verification.

Replication to all the above pleas—in estoppel: that after the note fell due, the plaintiff, the defendants and other named parties, between whom there were differences as to the liability of the defendants as executors, &c., to pay the note, and as to the rights of the several parties thereto, by an instrument under seal, referred it to the award of certain arbitrators, to “decree to whom the said promissory note then of right belonged either in whole or in part, *and by whom the said note was to be held*, and whether the same or any part thereof was then a binding contract or liability against the estate of the said testator in favor of any and what persons.” Averment—that the arbitrators, in pursuance of the submission, made an award within the proper time in that behalf, and awarded “that the said promissory note was a good and valid note and a binding contract and liability against the estate of the said testator, and that the same and the proceeds thereof belonged as follows—that is to say, part thereof, to wit, 15*l.*, to the late firm or to the estate of the late firm of Daniel Cleal & Co., being composed of Daniel Cleal and one Nathaniel Reid, and the remainder of the said note belonged to the said plaintiff.” The replication further averred that the defendants appeared by counsel before the arbitrators; that all the several defences in the above pleas existed (if they ever did exist) before the submission; and that the plaintiff, before the making of the submission, was and ever since had been the holder of the note—verification: conclusion in estoppel.

Special demurrer to the replication.

Held, That the replication was bad as the matter of it did not estop the defendants as to the second plea, and because it did not appear on the face of the submission or of the award that the plaintiff at the time of the reference and of the making of the award was the holder of note; and *Seemle*, the award was void for not determining all the matters submitted.

Process issued 2nd October, 1850.

Declaration, 15th October, 1850.

Assumpsit.

The first count states, that testator—to wit, on the 19th February, 1847—made a promissory note, bearing date—to wit, that date—payable one year after date (elapsed before

suit), to Daniel Cleal or order—860*l.*, with interest from date—and delivered the same to the said payee, who then endorsed the same to the plaintiff; and that after the making of the said note, and before it became due, the maker departed this life without having paid the said note, whereby defendants, as executrix and executor as aforesaid, became liable to pay to the plaintiff the amount, according to the tenor and effect thereof: and thereupon the defendants, as executrix and executor, &c., in consideration of the premises aforesaid, promised the plaintiff to pay him the said sum of money in the said promissory note specified; yet that testator in his lifetime, and defendants as, &c., since his death, had not nor had any or either of them paid the same or any part thereof to the plaintiff, to his damage of 1500*l.* 22nd October, 1850.

Pleas.—1st. That testator did not make the note—to the country, and issue.

2nd. Defendants did not promise, as in the declaration alleged—to the country, and issue.

3rd. That testator made the said note for the accommodation of the payee, Daniel Cleal, and without any consideration: and that there was not any consideration for the endorsement thereof by the said payee to the plaintiff, who always held and then held the same without any value or consideration—verification.

4th. That testator made the said note at the request and for the accommodation of the payee, without any consideration; and that after it became due, he endorsed it to plaintiff; and that plaintiff did not receive the same until after it became due—verification.

5th. That the making of the said note by testator was obtained by the payee and others in collusion with him, by fraud and covin; and that he endorsed to, and the plaintiff received the same with full knowledge thereof, and without any value or consideration for the testator making the same—verification.

6th. Fraud, as in fifth plea, and without any value or consideration from the payee to the testator; and that he endorsed the said note to the plaintiff after it became due;

and that plaintiff did not take or receive the same until after it became due, &c.—verification.

Then follow four other pleas, not included in this demurrer.

Replication (2nd November, 1850), to the first six pleas: that defendants ought not to be admitted or received to plead the same, or any of them; because after the making of the said promissory note, and after it was due and payable, and after the death of the testator, and while defendants were executrix and executor, and before suit—to wit, on the 27th of May, 1850—differences had arisen between the defendants as executrix and executor, &c., and the plaintiff, as to the right of the plaintiff to the said note, and to payment thereof, and as to the defendants' liability as, &c., to pay the same; and that at the same time differences had arisen between Gooderham and Brent, assignees of the payee, Daniel Cleal, a bankrupt, of one part, and James Good of the other part, touching their rights in the said note; and that an action was then depending in the Court of Queen's Bench, brought by the said assignees against the said Good, for the recovery of the said note; and that at the said time differences had arisen between said Good and defendants, as, &c., touching and concerning the rights of the last-mentioned parties, respectively, in or to the said note, and a suit in Chancery was then pending between the said Good and defendants, respecting the same; and that, such differences existing, and such proceedings pending, they, the said plaintiffs, Gooderham and Brent, assignees as aforesaid, the said Daniel Cleal, James Good, and defendants as executrix and executor, &c., by submission under the seals of the said respective parties, dated the day and year last aforesaid, did mutually agree that it should be and was thereby referred to the award, &c., of Thomas Clarkson, James Browne, and Thomas Brunskill, or to any two of them, to decree to whom the said promissory note then of right belonged, either in whole or in part, and by whom the said note was to be held, and whether the same or any part thereof was then a binding contract or liability against the

estate of the said testator in favor of any and what persons ; such agreement not to be taken as an admission of assets by defendants, or to render them personally liable, &c. ; and that the award of the said arbitrators, or of any two of them, on the matters so referred, should be made in writing on or before the 1st of July then next, with power to them or any two of them from time to time to enlarge the time, &c., with liberty to the said arbitrators to examine the parties or witnesses on oath. Also, that they should make such direction as to the said suit in the court of Queen's Bench, or as to the costs thereof, and also as to the said suit in Chancery and the costs thereof, and the costs of such reference, as to them should seem fit ; and that if they found that said Good was not liable in the said action in the Queen's Bench to the said Gooderham and Brent, then they, the said assignees, should pay him his costs thereof : that after the said arbitrators twice enlarging the time, the said Brunskill and Browne, two of the said arbitrators, having taken upon themselves the burthen of the said arbitration as aforesaid, and having considered all such matters, and duly examined all such witnesses as were produced before them, &c., made their award in writing under their hands, of and concerning the said matters so submitted to them, ready to be delivered to the parties in difference ; and did thereby then and there award that the said promissory note was a good and valid note, and a binding contract and liability against the estate of the said testator ; and that the same and the proceeds thereof belonged as follows—that is to say, part thereof—to wit, 154*l.* with interest from the 30th November, 1848—to the late firm, or to the estate of the late firm, of Daniel Cleal and Company, being composed of Daniel Cleal and one Nathaniel Reid ; and the remainder of the said note—to wit, 706*l.*, with all interest due thereon (excepting the interest on the 154*l.* above mentioned), belonged to the said plaintiff ; also, that defendants should pay the costs of the Chancery suit above mentioned ; upon payment whereof, such suit should be determined : that said Good was not liable in the said action of Gooderham and Brent ; and that they should pay

his costs, &c. : and that 20*l.* should be paid to the said arbitrators for their trouble, in the proportions therein specified, &c.

The plaintiff avers that neither of the defences in the six pleas mentioned arose since the making of the said agreement, but existed at the time, if they ever existed ; and that at the time—*i. e.*, the time of the making of the said agreement—the plaintiff was and ever since hath been the holder of the said promissory note, averring its identity ; and that he, with defendant's knowledge, then claimed to be entitled thereto in the same right in which he now claims and holds the same. The defendants appeared by counsel before the said arbitrators, and made defence, &c. ; and among other things against the claim of the plaintiff, that he was not entitled to the said note, or to any part thereof. That the said submission remained unrevoked, &c.—verification. Wherefore plaintiff prayed judgment whether defendants ought to be admitted or received against the said agreement and submission, and the said award, to plead the said pleas, or either of them, &c.

Demurrer (15th November, 1850) to the said replication to the said six pleas, assigning for the cause of demurrer—

1st. That it shews the said note and all remedy thereon merged in the covenant, submission, and award ; and that no action can be sustained thereon.

2nd. That it is a departure, the declaration averring a promise to pay the note to the plaintiff ; whereas the replication shews it payable to the plaintiff and others, to whom it belongs, and not to the plaintiff alone.

3rd. That it shews others—*viz.*, Daniel Cleal and Reid, or Daniel Cleal & Co.—to be joint owners with plaintiff, who ought to have been joined in the action.

4th. That it is inconsistent setting up an award as an estoppel, which award declared that the note and proceeds thereof belonged to the plaintiff and the estate or late firm of Daniel Cleal & Co. ; and yet it is afterwards alleged that at the time of the submission or reference, the plaintiff was and ever since hath been the holder thereof.

5th. That the said award cannot be set up or pleaded as an estoppel, so as to preclude the defences pleaded, the plaintiff having elected to proceed on the said note, and not the said submission and award.

6th. That nothing in the said replication is any answer to the said pleas or any of them, and that no sufficient estoppel is shewn thereby.

7th. That the said award should have been set forth *verbatim* or more at large, &c.

Joinder in demurrer, the 21st November, 1850.

The demurrer was argued last term (M. T. 14 V.), when *Hagarty*, Q. C., for the defendant, contended—

1st. That the plea was suicidal, and shewed that the plaintiff was not the holder of the note, as alleged in the declaration.

2nd. That owing to the joint interest thus shewn, all should have sued, although not entitled to equal moieties, but interested in different proportions of the proceeds; that tenants in common may sue jointly—at all events, one cannot recover the whole.

3rd. That the award does not direct payment to the plaintiff, even of his own share; and yet in this action he seeks to, and if successful will, recover the whole.

4th. That the defendants may have a set-off against Daniel Cleal and Reid, which this course would deprive them of the opportunity of pleading.

5th. That the award is silent as to by whom the note was to be held, although that point was submitted to them; wherefore it is not final as an award upon all the matters submitted.

6th. That Reid was no party to the submission, and yet his interests were involved and awarded upon; that he is not bound thereby as against the defendants, and the award is therefore not conclusive on the rights of all concerned in relation to the promissory note in question.

7th. That estoppels are mutual; and if the award estops the defendants, it is equally conclusive on the plaintiff.

Dalton, for the plaintiff, contended—

1st. That if Daniel Cleal and Reid were joint plaintiffs

with the present plaintiff, the defendants could not plead a set-off as against them.

2nd. That the award estops the defendants in relation to the matter of these pleas—citing *Price v. Hollis*, 1 M & S. 105; *Doe Morris et al. v. Rosser*, 3 East, 15; *Bailey v. Lechmore*, 1 Esp. 377; *Whitehead v. Tattersall*, 1 A. & E. 491; *Watson on Awards*, 200; *Russell on Awards*, 516-7; *Sybray v. White*, 1 M. & W. 435.

Sanderson v. Collman, 4 M. & G. 209.—That matter of estoppel in pleas may be pleaded—such as the acceptance of a bill in an action against the drawee, who disputes the handwriting of the drawer.

5th. That it is not assigned as a cause of demurrer that the award did not determine by whom the note was to be held, and that the plaintiff avers that he was the holder at the time of the submission, and still is.

6th. That the arbitrators had no power to decree payment, but merely to decide the rights of the parties to the note, &c., which they did; and that in the absence of any decree of payment, the legal remedies under the note remained as before.

7th. That no joint interest appears, but separate, distinct and partial interests in severalty.

8th. That plaintiff, being holder, is the party to sue; and when recovered, he will hold a portion of the proceeds as trustee for *Daniel Cleal and Reid*.

9th. That part of a promissory note is not transferable, nor can two parties interested in different portions sue separately; but that the one in possession—the payee or endorsee, in fact—may enforce it; and that the plaintiff is such endorsee and actual holder.—*Byles on Bills*, 126-7.

10th. That the plaintiff's legal right as endorsee and holder remains unaffected by the award, which, however, estops the defendants on particular points relative thereto, consistent with the plaintiff's legal title and the existence of the note as a subsisting security, and not involving any merger.—*Reid v. Furnival*, 1 C. & M. 538, 5 C. & P. 499; *Johnson v. Kennion*, 2 Wil. 262; 1 Lord Raymond, 360, *Hawkins v. Cardy*; *Carth.* 466, S. C. 65; *Bartlett v. Benson*, 14 M. & W. 733.

11th. That the award is sufficiently stated for the purpose of the estoppel, and that the defendants should have set it out more fully, if material.

MACAULAY, C. J.—It is not objected that the estoppel cannot be pleaded to a plea concluding in the country.—Sanderson et al. v. Collmant, 4 M. & G. 209; Braithwaite v. Gardiner, 8 Q. B. 473; McKenzie v. Fairman, U.C.C.P. 2 Ex. R. 368. And an estoppel in pleas may be pleaded, although it might estop the party in evidence.—Freeman et al. v. Cook, 2 Ex. R. 654.

The time of making, and the date of the promissory note declared upon, being both laid under a *videlicet*, the plaintiff might perhaps, upon a plea of *non-fecit*, prove a note made or bearing date some other day, the day laid not being descriptive of the instrument.—Smith v. Lord, 9 Ju. 450; 2 D. & L. 858; 14 L. J.; 2 Q. B. 112; Ty. Plg. 31-2, 280, 389, note; 2 Cam. 308, note; Symmons v. Knox, 3 T.R. 65; Grimwood v. Barrit, 6 T. R. 460; Purcell v. Macnamara, 9 East. 157; 1 Sand. 267; 2 Sand. 291, 306 (n.); 2 Q. B. 922; Cooper v. Black et al. 4 Q. B. 852; Shepperd v. Shepperd, 1 C. B. 849. Though on the pleadings it must be taken to be the true day until the contrary appears.—Owen v. Waters, 2 M. & W. 91; Anderson v. Westin and another, 6 Bing N. S. 296. Assuming the day laid to be the true date, the declaration does not shew distinctly whether the plaintiff became endorsee of the payee before or after the death of the maker.—1 Ex. 734; 13 Ju. 126.

When Elliott made the note, the law implied a promise by him to pay the amount to the payee, according to the tenor and effect thereof. Then, if the maker was alive when the payee endorsed it to the plaintiff, the law thereupon implied a promise by such maker to pay the plaintiff according to the tenor and effect.—Muttlebury v. Miller, Q. B. U. C. And if the note was so endorsed after the death of the maker, the law would thereupon—that is, upon such endorsement being made—imply a promise in the defendants, as then being executrix and executor of the maker, to pay the plaintiff, not exactly the promise as laid, which is absolute in terms to pay him the said sum of money in

the said note specified, but to pay according to the tenor and effect thereof.

But if it was endorsed to the plaintiff in the lifetime of the defendant's testator, I do not see that the law implied any promise by the defendants as his executrix and executor to pay the plaintiff, according to the tenor and effect of the note, upon their becoming executrix and executor, any more than a similar promise in law would have arisen by implication to the payee himself had he continued the holder.

The law had already implied a promise by the maker to the plaintiff; and the defendants executors would only be bound to perform that promise by paying the note when it became due, without the addition of a further promise on their part as such executors to do so.

If therefore the plaintiff was endorsee *before* the death of Elliott, and the alleged promise by the defendants was made after he died, but before the note became due, such promise must have been an express one, however useless as respected the plaintiff's remedy on the note, the Statute of Limitations not having commenced running.—*Musson v. Hill et al.*, 5 U. C. R. 60; *Neal v. Proctor*, 2 C. & K. 456.

But if such promise was made after the death of the maker and after the note had become due, it must have been express, and might be material in obviating the effect of the Statute of Limitations, especially if under the first issue the plaintiff might prove a note due more than six years before the commencement of the suit.

Whether the promise alleged was in fact made before or after the death of Elliott, or before or after the note became due is uncertain; and had it been specially demurred, to on that account, it would probably have been held bad by reason of such uncertainty. Adopting the time as stated in the declaration, and construing the word "then" as meaning "at the same time" or immediately afterwards"—*Stead v. Poyer, et al.* 1 C. B. 782; *Shepperd v. Shepperd*, *ib.* 849—it would be intended that the note was made on the 19th day of February, 1847, and endorsed to the plaintiff on the same day; and that when the maker

afterwards died, the defendants, as executrix and executor, becoming liable to pay the plaintiff thereupon, promised to pay the plaintiff the sum of money in the said note specified. The word "thereupon," like "then," may import the same time or immediately afterwards, or it may be introduced merely to mark the progress of events. *Bromfield v. Jones*, 4 B. & C. 384; *Bingley v. Durham*, 8 A. & E. 775.

If the making and endorsing are both to be necessarily referred to periods when the maker was alive, and the defendants' promise to a period *before* the note became due, it may be said that such promise was merely void (see 1 C. B. 849, *Shepperd v. Shepperd*; 2 M. & W. 738; 1 C. & K. 456; and see 7 M. & W. 738; 9 M. & W. 322; and 11 M. & W. 475), and may be rejected as surplusage, and the plea therefore bad on general demurrer. No exception has however been taken to it on the present demurrer, and if material, I apprehend the plaintiff might, under the averment as made, prove an express promise by the defendants since the note became due; at all events it is not for the court on this demurrer and under the points raised, to intend against it, but rather to infer that (admitting the plaintiff to have become endorsee in Elliot's lifetime) the defendant's promise was made not simply after his death but after the note became due (11 A. & E. 438); at any rate, that, whether regarded as an implied or expressed promise, it formed a material ingredient in the plaintiff's cause of action as laid, which cause of action is the making and endorsing of the note, with the alleged promise of the defendants to pay the amount.—*Timmis v. Platt*, 2 M. & W. 721; *Rollston v. Dixon*, 2 D. & L. 892; *Musson v. Hill*, 5 Q. B. U. C. 60.

The defendants have treated it as traversable by their second plea, and the plaintiff (not questioning the validity of such plea as a good bar) seeks to exclude it by the estoppel pleaded, instead of adding the similiter.

If such promise is an express one, it alone would be traversed by the second plea; if an implied one it might put in issue the plaintiff's title as endorsee; but the cases are

not in unison on this point—the latest (2 C. & K. 456) seem against it; and the fact of his being endorsee and holder of the note at the commencement of the suit is not otherwise denied.—Byles on Bills, 321; 2 M. & W. 722, 734, 799, Hay v. Fisher, *ib.* 56; 4 Tyr. 314, 325 (that the plea is good if not demurred to); Jones v. Williams, 7 M. and W. 491; Bancks v. Camp, 9 Bing. 604; 2 Moore & Scott, 734; Hunt v. Massey, 5 B. & Ad. 902; Henry et al. v. Burbridge, 3 Bing. N. S. 501; as to which see Stericker v. Barker, 9 M. & W. 321; 6 Dow. 79; Donaldson v. Thompson, 6 M. & W. 17; Pearson v. Archbold, 11 M. & W. 475; B. B. N. A. v. Jones, 6 U. C. Q. B. 66; Kelly v. Villebois, 3 Jurist, 1172; Neal v. Proctor, 2 C. & K. 456.

That since the new rules it is not an issuable plea, but no plea, and raises no issue of fact unless the promise be an express one.

It is necessary thus to notice the promise as laid in the declaration and the second plea, in order to the application thereto of the estoppel pleaded.

It appears to me the note is not merged in the award, but may be sued upon by the party entitled to hold the same.—Allen v. Milner, 2 C. & J. 447; Russell on Arbitrators, 505. Also, that if the award is valid as pleaded, it constitutes a sufficient estoppel as to the points involved in the 1st, 3rd, 4th, 5th, and 6th pleas (*vide* 13 M. & W. 137), and would preclude the defendants from denying that their testator made the note, or from asserting that he made it for the accommodation of the payee and without consideration, or that the note was obtained by fraud and covin. But it is said estoppels must be certain to every intent and mutually conclusive.—Co Lit. 303, 352; 2 Smith's L. C. 457, 438. Now looking at the submission and award as stated, the latter (1st) is not certain as to the second point—namely, by whom the note was to be held; nor (2ndly) does it contain anything to conclude the defendants as having promised to pay the plaintiff the amount or to prevent their denying any such promise, on the contrary, the submission is guarded so as not to be taken to admit assets or to render the defendants personally liable; and so far as mere

implication goes, the promise may rather be to pay the plaintiff a part only instead of the whole amount of the note—consequently, whether the second plea puts in issue the plaintiff's right to hold the note as endorsee, or denies only the express promise attributed to the defendants as executors, the submission and award do not estop them from traversing either or both of these points therein. These objections are not expressly stated as grounds of demurrer, but seem to me involved therein, so that we ought not to overlook them.

It is not necessary to decide whether (assuming the plaintiff's title as indorsee in fact not to be traversed by any of the pleas) the award is good *so far as it goes, or is stated in the estoppel* replied—that is conclusive on the first and third of these three propositions submitted to the arbitrators, although silent as to the second; or, whether fatally uncertain in not determining whether 154*l.*, part thereof, &c., belonging to the late firm of Daniel Cleal & Co., by Daniel Cleal and Nathaniel Reid, a stranger to the submission or to the estate of such firm, &c.

But, if necessary to be decided, I should consider the award void for not disposing of all the points submitted in relation to the note in question. The award seems to be stated in full; the plaintiff does not profess to set out a part only thereof—*i. e.*, so much as is material to the object of his replication, if that would do. Nor am I inclined to think the rule on this head, in relation to the declaration in actions on awards, applicable to pleas of arbitrament in bar—*Perry v. Nicholson*, 1 Bur. 281; *Ld. Ray*, 247, 611, 1039; *Aleyn*, 4; 2 *Lord Ray*. 1029; 1 *Lord Ray*. 247; *Carth.* 187; 1 *Sal.* 69, 76; 6 *Mod.* 221; *Ba. Ab. Arb. G.*; 2 *C. & J.* 447, *Allen v. Milner*; 2 *Tyr.* 113, 14, *S. C.*; 1 *Y. & J.* 19, *Gascoigne v. Edwards*; 2 *Sand.* 62 (b) (c); *Russel on Arbitrators*, 502—or to replications of arbitrament by way of estoppel.

In the latter case I should imagine it necessary to observe a degree of certainty quite equal to what is required in setting out awards in actions founded on arbitration bonds; and that the whole, or all that is material should be stated. Three

things, dependant matters, were submitted—namely, 1st. to whom the promissory note then of right belonged either in whole or in part. 2nd. And by whom the said note was to be held. 3rd. And whether the same or any part thereof was there a binding contract or liability against the estate of the said testator in favor of any and what persons. Two only appear to have been decided. The absence of the third prevents the estoppel being conclusive in omnibus, and probably renders the award void in toto.—7 East. 81; 5 A. & E. 147; 3 Q. B. 883.

The second plea intended to put in issue either, (first) the plaintiff's right and title as endorsee, or (secondly) to traverse an express promise alleged. As to the first—the submission and award shew differences between the parties on this head, without its appearing thereby who in fact held or possessed the note at the time of such submission. It may have been that Daniel Cleal had endorsed it to the plaintiff under circumstances which induced him or his assignees to dispute the validity of the plaintiff's title wholly or in part; or Good may have been the ostensible owner; or others may have been beneficially interested therein; at all events, it was a subject of difference whether the plaintiff had a right to the note or to the payment thereof; and (in conjunction with other things relative to the same note) it was referred to be determined by whom it was to be held. It does not appear in the submission or award that the plaintiff then in fact held it; and on the face of the award it is left uncertain who did or who was to hold it. Feeling this, the plaintiff imports into his replication (in order to complete the estoppel) an averment that the plaintiff then held it and still holds it—facts as to which the defendants cannot be concluded unless they appear in the proceeding which constitute the estoppel; and the submission and award do not with a certainty estopping the defendants from disputing these facts, shew that the plaintiff was the endorsee and holder of the note either at the time of the submission or the making of the award, or when the action was brought—all of which are material to have here conclusively shewn to work an estoppel under the second plea.

It is not enough to say that the award shews the plaintiff and Daniel Cleal and Reid beneficially interested in the whole note and interest (the plaintiff in far the larger portion), and that Daniel Cleal having endorsed it to the plaintiff, thereby by his own act constituted him a trustee so far as his claim extended.—Byles on Bills, 126, 164, and note (i). It was very important to the defendants to know to whom they were bound to pay the note, if, as the award shews, separate parties had distinct interests therein; and the award has not determined this important point.

As to the second: The submission and award do not import a promise by the defendants to pay the plaintiff the amount of the note, nor do they estop them from denying that they made such a promise. The award does not say they should pay him the amount thereof, nor can it be implied from anything that is awarded; whether, therefore, the second plea puts in issue all the material obligations in the declaration, or the plaintiff's title as endorser, or only traverses an express promise in fact, the replication does not shew the defendant's estoppel from denying that the plaintiff is endorser or holder, or that they promised in manner and form alleged.

Consequently the replication is not a good estoppel against the second plea, and being bad in relation thereto it fails as to the others to which the estoppel is jointly replied, on the ground that the replication is not divisible, and that failing in part it fails in toto.—Stephen's Plg. 448; Trueman v. Hurst, 1 T. R. 40; 1 Saund. 28 (2); Hartley et al. v. Manton, 2 Saund. 127; 5 Q. B. 247.

Judgment must therefore be for the demurrer.

SULLIVAN, J.—The plaintiff declares upon a promissory note made by the testator, Christopher Elliott, payable to Daniel Cleal or order, and delivered to Daniel Cleal, *who then* duly endorsed it to the plaintiff. The declaration then avers the death of the maker before the note became due (but not stating whether before or after the endorsement), whereby the defendants as executrix and executor became liable to pay the note; and *thereupon* that the defendants promised the plaintiffs to pay the sum of money in the

note specified (without saying on request or according to the tenor and effect of the note).

It is extremely difficult to say whether the promise by the executors is meant to be alleged as one made before or after the note became due, or whether the endorsement is meant to be alleged to have been made before or after the death of Christopher Elliott; the word "then" not necessarily meaning immediately after the making of the note, and the word "thereupon" not necessarily meaning immediately upon the death of Christopher Elliott, but equally referring to the endorsement, and possibly meaning upon an endorsement made after the death of Christopher Elliott. This uncertainty in the declaration makes it difficult to say whether the promise alleged to be made by the defendants is merely an implied promise arising upon the endorsement and death of Elliott before the note became due, or upon an endorsement of the note after the death of Elliott, and after the note was due, in which case the promise would be express, and properly traversable.

These questions become very important when the subsequent pleadings are considered. The defendants plead—

1st. That the testator did not make the note.

2nd. That they did not promise.

3rd. That the note was made for the accommodation of Daniel Cleal, and came to the plaintiff without consideration.

4th. The same plea of an accommodation note, and that it came to plaintiff after it fell due.

5th. Fraud in procuring the note to be made, and notice to the plaintiff.

6th. Fraud, and endorsement of the note after it became due.

To these pleas the defendant replies by way of estoppel, a submission to arbitrate, and an award. The matters in difference between the parties to the submissions are stated to be—first between the plaintiff and the defendants as to the right of the plaintiff to the note and to payment thereof, and as to the liability of the defendant to pay the amount of the note. 2nd. Between William Gooderham and James

Brent, as assignees of Daniel Cleal, a bankrupt, and one James Good, touching their right in the same indential promissory note; an action at law being brought by the assignees against James Good, thereupon and then pending. 3rdly. Between the said James Good and the defendants, touching their respective rights to the said promissory note, a suit in Chancery being then depending between them. Then the replication stated that the plaintiff, the assignees of Daniel Cleal, Daniel Cleal, the defendants, and James Good, by deed, submitted to the arbitrators to decide:

1st. To whom the note belonged in whole or in part.

2nd. By whom the note was to be held.

3rd. Whether the defendants were liable upon the note.

4th. To whom were they liable?

The arbitrators then are stated to have awarded (on the third point) that the note was a good and valid note, and a binding contract and liability against the estate of Christopher Elliott; (on the first point), that the said note and the proceeds thereof belonged as follows: the sum of 154*l.* with interest, to *the late firm*, or to the estate of the late firm of Daniel Cleal and Co., composed of Daniel Cleal and Nathaniel Read; and the remainder to the plaintiff. The replication does not state any award as to the second and fourth points submitted, *i. e.*, By whom the said note was to be held? To whom were the defendants liable?

The plaintiff claims, by means of this submission and award, to estop the defendants from pleading any of the pleas above mentioned; and to the replication, by way of estoppel, the defendant demurs.

One of the first of the questions which present themselves to me in considering this demurrer, is—whether or not the plaintiff, in setting out this award as an estoppel, is bound to set out the whole submission and award, so as to shew it to be a valid award.

It is clear that in debt on an award, the plaintiff is not obliged to set out the whole of the award.—2 Saunders, 62, n. 5; Foreland v. Marigold, Lit. Rep. 312; 1 Ld. Raymond, 315, S. C.; Telford v. French, 1 Sid. 161; Perry v. Nicholson, 1 Burr, 280; Gisborne v. Hart, 5 M. & W. 50.

From these cases, I conclude it to be law, that it is not necessary that the award should appear, as set out in the declaration, to be final, or mutual, or certain, or concerning all matters in difference.

And I take it also to be law, that under the plea of no award, the defendant can shew the award defective, either for matter appearing on the face of the award and submission, or for matter extrinsic; and that this is the proper defence when the legality of the award is meant to be contested.—See *Dresser v. Stansfield*, 14 M. & W. 823, where a plea setting out matters in difference not decided upon by the award was held bad, as amounting to the general plea of no award; for that the plea of no award denies not merely the fact of an award, but denies also an award according to the submission.—*Russell on Arbitration*, 506; see *Watson on Awards*, 357, 374, 376.

But it is said that in debt on bond for the performance of an award, the plaintiff, in answer to a plea setting out the condition on oyer, and pleading no award, is bound in his replication to set out the whole award.—*Perry v. Nicholson*, 1 Burr, 278; *Larke v. Batton*, Lit. 313; *Foreland v. Marigold*, *Ld. Raym.* 312. And in *Mitchell v. Staveley*, 16 E. 58, the defendant desiring to shew the award bad, in debt on a submission bond, set out the whole award, and pleaded that there were matters in difference not decided, shewing what they were.—See *Dresser v. Stansfield*, 14 M. & W. 823. *Alderson, B.*, remarking upon *Mitchell v. Staveley*, says there was a *prima facie* case by the bond, which the defendant had to displace by shewing an award that was invalid.

The necessity for the plaintiff in his replication, in an action on a submission bond, setting out the whole award, appears to me to arise in this way: the submission appears in the condition set out on oyer, and the plaintiff, in answer to the plea of no award, must shew an award good in *omnibus*, and in accordance with the submission, to answer the plea. It will not do for him, therefore, to reply that the arbitrators, amongst other things, awarded so and so—he must shew the whole to answer the plea. But nevertheless,

the rule must be taken with this qualification—that in rejoining to a replication setting out an award good on the face of it, the defendant cannot take advantage of an omission in the award which makes it vary from the true award, by rejoining no such award. This was expressly held in the case of *Fisher v. Pimley*, 11 E. 188, where to a replication setting out an award good as set out, the defendant rejoined, shewing the true award verbatim. The court, on demurrer, held this rejoinder no departure, and moreover, that the defendant could not have rejoined no such award with safety, for there was in fact such an award as stated in the replication, so far as it went.—*Hickes v. Cracknell*, 3 M. & W. 72, and *Gisborne v. Hart*, 5 M. & W. 50, are in accordance with this doctrine. *Maxwell v. Ransom*, 1 U. C. R. 219, which is against this view of the subject, I am inclined to think would not be held good law at present.

But these cases do not settle the question, whether, in pleading an award as an estoppel, it is necessary to set out the whole, so as to shew it a good award in *omnibus*, as in the case of a replication to a plea of no award in debt on a submission bond.

In the two precedents (3 Chitty's Pl. 105) awards are pleaded; the submissions are shewn, and the allegation is, that the arbitrators made their award of and concerning the premises, and did thereby award, &c. The award is set out in the same manner, and there is nothing to shew whether it was intended to set out the whole award or only the part necessary. See also the precedent in *Watson on Awards*, 527.

Berney v. Read, 7 Q. B. 79, was an action of trespass for cutting furze and digging gravel. The defendants pleaded that before the time, when, &c., the defendant's landlord, for himself and his tenants, occupiers of a certain farm, claimed the right of cutting furze and digging gravel on the *locus in quo*, and that this right and *other matters in difference* between the landlord and plaintiff, were submitted to arbitration, and the arbitrators awarded that the landlord and his tenants had the right to cut the furze and dig the gravel; the plaintiff replied, traversing the reference.

Now in this case it is to be observed that the award cannot be said to have been shewn to be good, for nothing is shewn as to what became of other matters in difference; no question was raised on the validity of the plea, so that the point now in question was not decided.

I cannot find the point directly decided, but from analogy with the cases cited in Chitty's Pl. 1, 560, 629, 678, it appears to me the most reasonable conclusion that in a plea or replication, and particularly in the latter by way of estoppel, the whole award, or at least a good award in *omnibus* must be set out, and that the party pleading it, must be taken to set out all of it that is material, and that if he do not shew a good award concerning the premises submitted, his replication is bad on general demurrer.

Supposing this to be the law, and that the award set out by the plaintiff is to be taken to be the whole award, it seems to me defective in one important particular. The questions, as to who should be the holder of the note, and to whom the defendants were to be liable, were submitted distinctly and apart from the other question, to whom the note belonged in the whole or in part? The arbitrators awarded upon the part ownership of the note—that is, that a portion of the amount or proceeds belonged to one party, and the remainder to another, leaving it undecided who was to be the holder; which undecided question involved the farther point, to whom were the defendants to be liable? It is very plain that a promissory note cannot in law be endorsed for a part, so as to make two distinct holders in separate interests; and nothing is more plainly established than the distinction between the legal holding of a note and the equitable right to the proceeds, or to part of the proceeds.—See *Machell v. Kinnear*, 1 Starkie, N. P. C. 499; *Byles on Bills*, 112, 113, 114; *Treuttel et al. v. Baraudon et al.*, 8 Taunt. 100; *Sigourney v. Lloyd*, 8 B. & C. 622; 5 Bing, 525, *Lloyd v. Sigourney*; 1 *Crompt. & Mees*, 538, 5 C. & P. 599.

But supposing on the other hand, that the award set out is not to be taken to be the whole award, and that the court will not intend any omission on the part of the arbitrators,

merely because there is an admission in the replication, it is still very plain that if the award as pleaded is vicious and void on the face of it, the replication must be bad on general demurrer.

In this case the question as to who was of right *entitled to the note or its proceeds in the whole or in part*, was submitted by the following parties to the submission: 1st, the plaintiff; 2nd, the assignees of Daniel Cleal, a bankrupt; 3rd, Daniel Cleal himself; 4th, the defendant; 5th, James Good.

Now the decision of the arbitrators, as stated in the replication, is—that *Daniel Cleal & Company*, that is to say, Daniel Cleal and Nathaniel Reid, *or the estate* of the said company, are or is entitled to a part of the note or of its proceeds. Then, to pass by the introduction of a stranger to the award as one of the persons entitled, the award cannot be good in the alternative, Daniel Cleal & Company, and the estate of Daniel Cleal & Company cannot well be indetical, for it is disclosed that Daniel Cleal was a bankrupt, and his assignees were parties to the submission. Was it then to Daniel Cleal, or to his assignees, or to other assignees not named of Daniel Cleal and Nathaniel Reid, or to Daniel Cleal and Nathaniel Reid, that the arbitrators meant to award this portion of the proceeds of the note? It seems to me that the award as thus shewn, is void for uncertainty and want of finality on a point intimately connected with the main subject matter of the submission. I think, therefore, that the replication is bad for shewing a defective award.—1 Ser. 160; 1 Lev. 113; 1 Saund. 62, n. 5.

If these objections to the award should be considered to rest on doubtful authority, the main question in the case would arise—namely, whether this award as set out, supposing it to be a valid award, constitutes an estoppel upon the defendant, to prevent him from pleading all the pleas to which it is replied. As regards these pleas, with the exception of the plea of non-assumpsit, I consider that there is no doubt but that the award would be an estoppel. As regards the plea of non-assumpsit, the difficulty arises which, in describing the declaration, I first mentioned. The

promise alleged in the declaration is not by the maker of the note, but superadded to the promise contained in the note itself, which promise was that of the maker to pay to the payee or order. The promise superadded is alleged to be made by the defendants as executrix and executor. The time of this promise in relation to the time of the other events, which together constitute the cause of action, is not stated, and for some reason the statement of the time appears to have been studiously avoided. I feel at a loss, therefore, whether the promise alleged is one made by the executors while the note was yet running and not due, or whether it is a promise alleged to be made by the executors after the cause of action accrued. In the case of *Timmis et al. v. Platt*, 2 M. & W. 720, which was an action upon a promissory note which fell due in the lifetime of the testator, and in which a promise by the defendant to pay the plaintiff's executor on request, was laid as made after the note fell due, non-assumpsit was held to be a good plea, notwithstanding the rule of court as to pleadings in actions on bills and notes, Baron Parke saying that the action was not upon the note *simpliciter*, and that the rule did not apply.

In the case of *Masson v. Hill*, Exr. 5 U. C. R. 61, which was an action upon a promissory note endorsed by the testator, and which fell due after his death, the declaration alleged presentment to the maker and non-payment, notice of non-payment to the defendants as executors, and a promise by the executors to pay the plaintiff the amount of the note on request. The plea was to so much of the declaration as alleged that the defendants promised, non-assumpsit.

This plea was held bad by Robinson, C. J., and McLean, J.; they holding, however, that in such a case the plea of non-assumpsit was admissible; for that the action was not upon the bill or note *simpliciter*, being not between the parties thereto; and this is stated as a general rule, that when the action is not between the parties to the note—as where it is prosecuted or defended by executors—then the action is not upon the bill or note *simpliciter*, and the plea of non-assumpsit is then admissible. The Chief Justice and Mr. Justice McLean held the plea bad, because it was pleaded to only

so much of the declaration as averred the promise, which was taken to be an implied admission of the other averments in the declaration.

Mr. Justice Macaulay held the plea bad, because it was contrary to the rule of court, which makes the plea of non-assumpsit, in actions upon bills and notes, inadmissible. He also held the plea bad as being restricted to the averment of the promise.

I have repeatedly considered the case of *Masson v. Hill*, without being able to concur in the reasons given by the learned judges for the decision. What I understand by an action on a bill or note *simpliciter* is, that the action is so in all cases where the assumpsit averred in the declaration is necessarily implied from the precedent matter stated, as was in fact the case in *Masson v. Hill*. The cases cited in the judgment of Mr. Justice Macaulay—*Powell v. Graham*, 7 Taunt. 581; *Dowse v. Cox et al.* 3 Bing, 20; *Biddell v. Dowse*, 6 B. & C. 255; *Corner v. Shaw*, 3 M. & W. 350—shew that promises are implied from liability by, or to executors. *Henry v. Burbridge*, 5 B. N. C. 501; *Griffith v. Roxborough*, 2 M. & W. 734; *Smith v. Cox* 11 M. & W. 475, shew that as a matter of form in actions of assumpsit, where the party sued on a bill or note is not in the terms of the instrument an express promisor, there must be a formal promise alleged. In *Masson v. Hill*, it was argued that the promise alleged was one which might have been implied; yet it is said the action was not upon the bill or note.

Timmis et al. v. Platt, 2 M. & W. 720; *Gilbert v. Platt*, 5 Dow. 748, 2 D. & L. 892, are all cases in which the cause of action was complete in the lifetime of the testator, and when all the promises which could be implied, had been implied before the time of the executor, and therefore the actions were of necessity upon express promises. For if, as Baron Parke said in *Timmis v. Platt*, a new promise could be implied by or to the executor, the Statute of Limitations would begin to run, not from the accruing of the cause of action, but from the death of the testator. In these cases, therefore, the actions were not upon bills or notes *simpliciter*, but upon express promises, to which the bills or notes are inducements.

The note in 2 Saund. 63, and the cases therein cited, appear to me to include these cases only when the production of the bill or note and proof of its being made or endorsed, could not be evidence of the promise laid in the declaration. An express promise by or to an executor cannot, without a departure, be replied to a plea of the Statute of Limitations, when the promise by or to the testator is laid in the declaration; and therefore if the plaintiff means to found himself in the end, upon an express promise by or to the executor, he must frame his declaration so as to match such a case; but it does not follow, that in all cases where the promise is averred as by or to the executors, it is therefore an express promise; this only follows when the promise averred cannot be implied in law. In cases where the promise averred may turn out to be either express or implied, which it will be is not ascertained until the Statute of Limitations is pleaded and replied to; and in this respect actions by or against executors do not differ from actions between the parties to the bill or note; in either case a reply of a promise within six years, if the first cause of action accrued before, or a reply of an express promise. I think the plea of non-assumpsit in *Masson v. Hill* was bad, as being directly in the face of the rule of court—perhaps it was a nullity for the same reason.—See *Sewell v. Dale*, 8 D. P. C. 309; *Fraser v. Newton*, 8 Dow. Pr. C. 773; *Kelly v. Villebois*, 3 Ju. 1172; *Neale v. Proctor*, 2 C. & K. N. P. C. 456. Or it may only have been bad on demurrer, as held in *Donaldson v. Thompson*, 6 M. & W. 318; but it seems at all events clear to me, that non-assumpsit generally pleaded to the whole count, would have been equally bad with the plea of non-assumpsit pleaded to the promise.

In the present case, the promise set out in the declaration would probably be held a special one, that is after the note was due, and the cause of action complete in the lifetime of the testator; the count would have been bad on special demurrer, for this not being made to appear with certainty one way or the other, the promise may have been intended as special at all events, and might have become so accord-

ing to subsequent pleadings. If the promise were a merely implied one, it is doubtful whether the plea of non-assumpsit puts anything in issue. According to *Neale v. Proctor*, which I before cited, it would seem that it does not; for there at *Nisi Prius*, Alderson, B., allowed a verdict to be taken for the amount of a bill and interest, without evidence, on a plea of non assumpsit. According to other authorities, the plea of non-assumpsit not demurred to, and upon which issue was taken, would put in issue the endorsement of the note and the implied averment that plaintiff was the holder at the time of action brought. The opinion of the court in *Masson v. Hill* was, that the plea of non-assumpsit, if pleadable in an action on a bill or note (by reason of the action not being on the bill or note *simpliciter*) would have the effect of denying the making, endorsement, &c.

What the effect of a plea of non-assumpsit, if pleaded to a count upon a bill or note *simpliciter*, would be upon issue joined seems not as yet settled; but at all events this is not an issue joined but an estoppel replied; and I do not see that, according to any interpretation, I can give the promise averred, that the award as pleaded estops the defendants from pleading that plea.

It appears to me that judgment must be for the defendants.
McLEAN, J., concurred.

Per Cur.—Judgment for defendants on demurrer.

PHELAN V. PHELAN, HEIR-AT-LAW OF PHELAN.

The ancestor of the defendant made an agreement under seal with the plaintiff, as follows:—"Now the condition of this agreement is such—the said John Phelan [the defendant's ancestor] doth hereby for himself, his heirs, executors, administrators and assigns, give up unto the said James Phelan [plaintiff] all his right, title and interest in and to lot 45 in the first concession of North Easthope, and to give him a clear deed of *the same*, and also one waggon, one fanning mill," &c. The plaintiff on his part did for himself, his heirs, &c., in consideration of the above deed and articles mentioned, promise and agree to pay unto the said John Phelan (defendant's ancestor), his heirs or assigns, the sum of 250*l.*, by instalments, and also to allow the said John Phelan the use of the dwelling house in which he then resided and four acres of land during his lifetime.

Held, per Cur., (Sullivan, J., dissentiente), that the words "the same" in the agreement, referred to lot 45 as their antecedent, and not to the right, title and interest of the defendant's ancestor therein. By Sullivan, J.—that the words referred to the right, title and interest of the ancestor in the land, and not to the land itself.

In an action of covenant brought by James Phelan against the heir-at-law of John Phelan, on the above agreement, which was set out upon oyer, the breach assigned was, that neither the ancestor in his lifetime, nor the defendant since his death, although often requested, did or would give plaintiff a clear deed of said land. Defendant pleaded 2ndly, non-payment of purchase money in agreement mentioned : verification. 3rdly, that no conveyance of the land had been tendered for execution to defendant or his ancestor : verification.

Replication to 2nd plea—that plaintiff was always ready and willing to pay the purchase money pursuant to the terms of the agreement : to the country, and issue.

To 3rd plea—that plaintiff did tender a conveyance to the ancestor in his lifetime, and to defendant since his death : to the country, and issue.

At the trial a verdict was rendered for defendant on the 2nd & 3rd issues.

Held per Cur.—Judgment for plaintiff on the above issues, *non obstante veredicto*. Sullivan, J., *dissentiente*, on the ground that the declaration was bad, as the breach assigned, that neither defendant nor his ancestor would give plaintiff a “clear deed of the said land,” was not warranted by the terms of the agreement, and that no breach of that agreement was shewn.

Covenant.—The declaration states that Jno. Phelan, deceased, in his lifetime, to wit, on the 28th September, 1842, by deed made between him of the one part, and plaintiff of the other part, of which profert is made, whereby the said John Phelan, for the consideration therein mentioned, did for himself, his heirs, executors, administrators and assigns, give up unto the said plaintiff all the right, title and interest of him the said John Phelan, in and to Lot 45, 1st concession North Easthope, and the said John Phelan did thereby, for himself and his heirs, covenant and agree to and with plaintiff to give him a clear deed of the same ; then assigns for breach, that neither the said John Phelan in his lifetime, nor the defendant as his heir-at-law, since his death, although often thereto requested, did or would give to the plaintiff a clear deed of the said land, but so to do said John Phelan in his lifetime always refused, and defendant since his death hath neglected and refused, and still neglects and refuses so to do, contrary to the said covenant, &c. Oyer being prayed, the deed is set out as being a memorandum of an agreement made and entered into the 28th September, 1842, between John Phelan, senr., and plaintiff, proceeding as follows : “Now the condition of this agreement is such—the said John Phelan doth hereby for himself and heirs, executors, administrators and assigns, give up unto the said James Phelan (plaintiff) all his right, title and interest in and to lot 45 in 1st concession North Easthope, and to give him a clear deed of the same ; and also one waggon, one fanning mill, two ploughs,

and two harrows; and the plaintiff did for himself, heirs, executors, &c., for and in consideration of the above deed and articles mentioned, promise and agree to pay unto the said John Phelan, his heirs or assigns, the sum of 250*l.* as follows: 12*l.* 10*s.* 0*d.* at the end of three months from date; 18*l.* 15*s.* 0*d.* at the end of twelve months, and the remainder in seven equal annual instalments; and also to allow said John Phelan the use of the dwelling-house in which he then resided, and four acres of land between said house and the concession or side road, during his lifetime.

Pleas:—1st. *non est factum*, and issue.

2nd. That plaintiff did not pay unto the said John Phelan during his life, or to any other person or persons since his death, the said 250*l.* in manner and at the times appointed therefor, being the condition for which said deed was to be made: verification.

3rd. That plaintiff never tendered or offered to said John Phelan in his lifetime, or to defendant as his heir since his death, for execution, a deed of said land, according to the tenor of said deed (*quære agreement*), although said John Phelan in his lifetime, and defendant since his death, have been always ready and willing, and offered to execute and deliver such deed: verification.

1st. Replication and *similiter* to first plea.

2nd. That plaintiff was always ready and willing to pay to said John Phelan during his lifetime, and to defendant since his death, the said sum of money, in manner and at the times appointed by the said deed: concluding to the country and issue.

3rd. That he tendered and offered to said John Phelan in his lifetime, and to defendant as his heir-at-law since his death, for execution, a deed of said land, according to the tenor and effect of the above recited deed; but that said John Phelan in his lifetime, and defendant as heir as afore-said since his death, refused to execute the same: to the country, and issue.

The cause was tried at the Autumn Assizes, 1850, held in and for the county of Oxford, before Mr. Justice Draper, when a verdict was rendered for the plaintiff on the first issue, with

400*l.* damages, and for the defendant on the second and third issues.

In the early part of Michaelmas term, 1850, *Miller*, for plaintiff, obtained a rule calling on the defendant to shew cause why the plaintiff should not have leave to enter judgment on the second and third issues on the record in this cause, notwithstanding the verdict of the jury on the said issues in favour of the defendant; or why a repleader should not be awarded. Cause was shewn by *Cameron, Q. C.* for the defendant. He contended that the declaration was bad in arrest of judgment, and that the plaintiff could not obtain judgment *non obstante* on the second and third issues, upon a declaration on which the whole judgment may be arrested. He admitted the pleas to be bad, and that the application should prevail if the declaration is good and warrants it. He objected to the declaration, that the breach was too large and exceeded what the covenant warranted, and was uncertain; that the covenant did not bind the heir of John Phelan to execute a deed of the land, and if it did, it did not appear; nor was it alleged what estate or interest he was to convey, whether for years, for life, or in fee; that the meaning of the words "a clear deed," are uncertain; that no time is appointed for its delivery, and that no sufficient request was averred—the general allegation of its execution having been often requested, was insufficient; that a fixed time or a reasonable time ought to have been averred, and a tender and refusal distinctly stated. He cited as applicable—Platt on Covenants, 145; Challoner v. Davies, 1 Lord Raymd. 402; 1 Roll. Ab. 438; Tempest v. Kilner, 2 C. B. 300; Robertson v. Showler, 13 M. & W. 609. That the deed should be stated according to its legal effect, which was not done; that a repleader would be the proper course, owing to the nature of the issues joined, if the declaration was good; but that as it is, the only course is to discharge the rule, or to grant both parties leave to amend *ab initio*.—Cook v. Pearce and another, 8 Q. B. 1044, 13 Jurist, 565.

Miller, in reply, said the validity of the declaration was not involved in an application for judgment on two out of three

issues; that plaintiff had a verdict on one issue, and if allowed judgment *non obstante* on the second and third issues, the question would then arise, and not till then, whether he was entitled to the general judgment, or whether it should be arrested; and that it was now too late to move in arrest of judgment (New Rules, 38). He also contended that the declaration was good on the face of it, and supported by the deed as set out in oyer, which bound the defendant's ancestor and his heir to give a clear deed, which imported a deed in fee, whereupon the breach was not too large. Reference was also made to an action of ejectment in the Queen's Bench, in which it was held that the deed did not of itself convey any estate to the plaintiff.

MACAULAY, C. J.—I do not understand it to be contended that a covenant for self and heirs does not bind heirs, and it is not alleged that the defendant has not assets by descent. The case is not therefore like that of Vankoughnet v. Ross, lately decided in the Q. B.—7 U. C. R. 248. See 2 Black, 243; Platt on Covenants, 449; Wilson v. Knubley, 7 East. 128; Farley v. Briant, 3 A. & E. 839; 2 Saund. 8 (a) B. (2) ib. 136-7, ib. (4); Brown on Actions, 253, 115-6, 138; Hunting v. Sheldrake, 9 M. & W. 258; 1 And. 7; 3 Sal. 178; Stat. 3 Wm. & M. ch. 14. sec. 5; 1 Wm. IV. ch. 47, secs. 6 & 7; 2nd & 3rd Vic. ch. 60; Com. Dig. Plr. 2 E. 3.

Nor was it contended that a plea denying the tender of a deed for execution, was a good one in bar of the action, or that payment of the consideration was a condition precedent, but the second and third pleas were admitted to be bad in law.

Of the cases relative to the necessity of a vendee tendering a conveyance for execution, I may mention Bass v. Brown, Q. B. U. C.; Mouch v. Stewart, 4 U. C. R. 203; Wilson v. Dickson, Q. B. U. C.; Hoyt v. Widdifield, Q. B. U. C.; Prindle v. McCan, 4 U. C. R. 228; Macdonell v. Snitsinger, 5 U. C. R. 312, and the English authorities therein referred to.

That the payment of the purchase money was not a condition precedent seems very plain. Nor was it contended

that the pleas did not sufficiently confess, or were not so entirely immaterial as to entitle the plaintiff to judgment *non obstante veredicto*.—Negelen v. Mitchell, 7 M. & W. 612, 622.

Then, admitting that the defendant's ancestor had, during his lifetime, to give a clear deed to the plaintiff (1 Roll. Ab. 438-9; Co. Lit. 208; Com. Dig. Condñ.; Cro. El. 798; 1 Ld. Raymond, 402), he failed to do so; his covenant was therefore broken, without regard to any subsequent omission or refusal on the defendant's part as heir-at-law, or to the sufficiency of the request made to the ancestor in his lifetime, which, so far as material or necessary to be alleged, I think sufficient.—Bowdell v. Parsons, 10 E. 359; Higgins v. Highfield, 13 E. 408.

But it was contended that the declaration was bad in arrest of judgment, and that therefore the plaintiff could not obtain judgment *non obstante*. The ground of objection to the declaration being uncertainty touching the estate or interest of which the plaintiff was entitled to receive a clear deed, and that the breach was too large, the plaintiff not being entitled to a clear deed of the land in fee, nor at the utmost to more than a deed clearly sufficient to transfer all the right, title and interest of the defendant's ancestor, whatever that might be. If the declaration is bad after verdict, I am disposed to think it a good answer to this application, judgment *non obstante* being always on the merits, and not allowable as to some pleas relating to the whole cause of action, where upon the whole record the judgment ought to be, or might be, arrested. It is too late (under the new rules) to move in arrest of judgment now without special leave, but the effect of such a motion forms a test on the present occasion.—Smith on Actions at Law, 161.

But, for my part, I do not consider the declaration bad on the ground urged: the words of the agreement are "the said John Phelan doth hereby for himself, his heirs, executors, administrators and assigns, give up unto the said James Phelan all his right, title and interest in and to lot No. 45, in the first concession of the township of North

Easthope, and to give him a clear deed of the same, and also one waggon, &c.”

In the case of Doe dem. Phelan v. Phelan, in the Queen's Bench, I expressed my opinion that this agreement did not in itself constitute a conveyance of all the right, title, and interest of the defendant's ancestor, but that it was executory, and that the words “agree to” should be understood before the words “give up,” when it would read thus : that Phelan (as the ancestor) doth hereby, for self and heirs, agree to give up to the plaintiff (not saying and his heirs) all his right, title and interest, in and to lot No. 45, &c., and to give him (not saying and his heirs) a clear deed of the same, and also certain enumerated articles of personal property, followed by the plaintiff's promise and agreement for self and heirs, in consideration of such deed and articles mentioned, to pay to the said ancestor, his heirs and assigns, 250*l.* by instalments, and to allow him the use of the dwelling house in which he then resided, and four acres of land during his lifetime, meaning, I think, four acres of the said lot, with a house thereon. In its own terms (which are stronger) it says, John Phelan (the ancestor) doth hereby give up all his right, title and interest, &c. ; and if this read as absolute in itself, then to render sensible the clause relating to a clear deed, the word “agree” should be understood between the words “and” and “to” preceding “give.” The precise terms in which the agreement is expressed are material in the question, whether by “*clear deed*” is meant only a deed sufficient to pass all the right, title and interest of the ancestor, without defining it, or a mere further assurance of such right, &c., as distinguished from something additional—namely, a clear deed of the lot or of the land.

As respects the argument of uncertainty respecting the words “clear deed,”—first, as to their relation to antecedents—or secondly, as to their legal import in point of estate or interest—it is plain the defendant's ancestor agreed to give a clear deed of one of two things—that is, a deed of all his right, title and interest, &c., or a deed of the lot, and the objection of uncertainty ceases whenever

it is determined (if it can be determined, as I think it may) to which the words "clear deed" relate; for if they relate only to "right, title and interest," (then whether the agreement be regarded as executory or executed) they would not bind the ancestor to anything beyond a mere assignment or transfer of his right, &c., whatever it was, or to give a deed for the further assurance thereof; whereas if they relate to the lot itself, I think he undertook to give a clear deed in fee.

The Duke of St. Albans v. Shore—1 H. B. 274: To make a good title means to convey by a good title, and he who is bound to convey, is bound to prepare and tender a deed.—*Ib.* 280, Hallewell v. Morrell, 1 M. & G. 366, 387. Maule, J.—When a man contracts to sell *prima facie*, he contracts to sell the fee. And see Martin et al. v. Smith, 6 East, 553; Ferry and another v. Williams, 8 Taunt. 62, 1 Moore, 498; Doe ex d. Clarke and another v. Stillwell, 8 A. & E. 645; 1 Y. & C. N. S. 658; 1 Chitty's Practice of Law, 292-3; Wilks v. Smith, 10 M. & W. 360; Playfair v. Musgrove, 14 M. & W. 240; Crabbe's Law of Real Property, head "Title."

The sufficiency of the declaration depends therefore upon the validity of the breach, which assigns, as the plaintiff's ground of action, the non-delivery of a deed of the land, and which is contended to be too large, because the words "*clear deed*" do not bear a co-extensive import. The defendant did not demur to the breach as being too large, but pleaded over pleas intended to excuse it.—Hobson v. Middleton, 6 B. & C. 302, 9 D. & R. 255; Stead v. Poyer, 1 C. B. 787, 1 M. & G. 926.

The agreement is loosely drawn, but it is to be construed according to the intention of the parties as collected from the whole instrument, *ex antecedentibus et consequentibus*; the words being taken most strongly against the covenantor or party employing them "*verba fortius accipiantur contra proferentum*"—Parker, B., in Dendy v. Powell, 3 M. & W. 444; regard being always had to the apparent intention of the parties as collected from the whole instrument. The King v. The Inhabitants of Castell Careinion, 15 East,

541 & 6. And so of pleadings—Brown's Maxims, 238, 249, 254; 2 C. & J. 230; Coles v. Hulme, 8 B. & C. 568; The King v. the Inhabitants of Castell Careinion, 8 East. 79; Doe Dem. Child v. Wright et al., 8 T. R. 65; 2 B & Car. 380; Co. Lit. 420 (a), 183 (a); 2 Lev. 155; Winch. 92-3, 302; 9 D. & R. 256.

Taking the whole together, I think it imports on the face of it, that the defendant's ancestor was in possession of the lot, and possession *prima facie* imports a seizin in fee; and no less estate or interest appears or is shewn. The agreement further imports a contract for the absolute sale of something for a valuable consideration, and that for whatever the ancestor contracted to sell him, he was to give a clear deed.

The language used by the parties does not imply merely the sale and purchase of the undefined right, title, and interest of the defendant's ancestor, without regard to the quantity or quality of the estate, much less that the plaintiff was contracting for a shadow, if he had no estate at all; I think the legal presumption and intendment must be that the ancestor professed to have and to sell some legal right, title and interest in and to the lot in question, and that in the absence of anything to limit or qualify such presumption, the only intendment in law must be that he contracted to sell and give a clear title in fee.

Although Lord Ellenborough said, in Andrews v. Whitehead, 23 East. 112, on demurrer, "that no intendment was to be made either way, but that the plaintiff (who was to recover upon the strength of his own case) was to shew that sufficiently to entitle himself—he only meant (I think) that no inference could be drawn from the plaintiff's statements on the pleadings, but that he should state his case with sufficient precision; for it is not the rule applied to the construction of contracts which is the present object; all cases of implied covenants, &c., are against it.—See Harris v. Goodwin, 2 M. & G. 411-2, and note (a); 1 Saund. 312-4 ib. 228 (b); Edinburgh Railway Company v. Hebblewhite, 6 M. & W. 707, as to pleadings.

If the condition of a bond be to release all the right which *A.* has in *B.* for his life, *A.* cannot say that he had

no right in *B.* for life.—1 Roll. 873 lt. 5; see Archd. Pldgs. and Evidence, 196; Dyer, 79; 2 T. R. 171, Fairtitle v. Gilbert. In general the party granting is estopped by his deed to say he had no interest. To an action by plaintiff against the ancestor for not giving a deed of all his right, &c. he could not plead that he had no right, title or interest and a mere deed, sufficient in form but conveying no interest, because the grantor had nothing to convey, would not be a valid performance of the contract; the allegation of *seizin prima facie* implies occupation.—Scott v. Scott et al., 16 East. 343; 2 G. & D. 174; Clayton v. Corby, 2 Q. B. 813; England v. Wall, 10 M. & W. 699; Purnell v. Young, 3 M. & W. 296; Crabb P. 1000, S. 2179; and possession is *prima facie* evidence of seizin in fee—Jayne v. Price, 5 Taunt. 326; Cow. 595; Roper v. Coombes, 6 B. & C. 534; Doe d. Harding v. Cook, 7 Bing. 346; Doe d. Bassett et al. v. Mew, and Doe dem. Edwards and others v. Gunning et al., 7 A. & E. 239; Elliott v. Kemp, 7 M. & W. 312; Wilks v. Smith, 10 M. & W. 355; Luxton v. Robinson, 2 Dougl. 620; Hallewell et al. v. Morrell et al., 1 M. & G. 367; Souter v. Drake, 5 B. & Ad. 992; Mattock v. Kinglake, 10 A. & E. 50; 2 P. & D. 343.

Now, when the ancestor for himself and heirs, &c., gave up or agreed to give up (whichever it was in legal construction) all his right, title, and interest in and to the lot, his words indicate very clearly, I think, that he was not only using the word heirs, &c., in order to bind his heirs by the covenant, but also in order to bind them in relation to the estate given up or to be given up; and if so, it shews that he contemplated parting with an estate or interest that would otherwise go to his heirs, and if so, there is nothing to limit the presumption that such estate or interest was in fee.—1 Lord Raymond, 273, 300, 400. The heirs of the plaintiff are not added after his name; but if the ancestor was seised in fee, doubtless the absolute terms of the agreement entitled the plaintiff to a clear deed thereof to himself and heirs.

If the words “clear deed” relate to the words “right, title, and interest,” they aid the presumption that the latter words import *prima facie* the fee, for a clear deed of such

right, title, and interest was to be given—and if so, I do not see how any deed could be called a clear one that did not import a clear title, or how the title could be called clear if it was only a temporary or undefined interest, and not the fee. Further, the plaintiff for himself and heirs, &c., not only agreed to pay the price of 250*l.*, but to allow the defendant's ancestor the use of the dwelling-house in which he then resided and four acres of the land during his life, the plaintiff so using the word "heirs" not only in order to bind such heir to the payment of the purchase money, but also to bind him in relation to an estate that might descend upon him during the lifetime of the defendant's ancestor, and who was to be secured a life-estate in the house, and four acres; any conveyance afterwards executed in performance of the covenant to give a clear deed, would contain this reservation in favor of the ancestor; and it not only imports a present possession in him, but that an interest exceeding the lives of himself and the plaintiff, and to which their heirs might succeed, was contemplated. The personal property mentioned in the agreement was evidently to be absolutely transferred, so far as that can be material to the construction, and in addition to the force of the word "clear," the word "give" as used adds to it.

Before the statute of *quia emptores*, the word "give" in a feoffment implied a warranty of title against the feoffer and his heirs—1 Barton's Precedents, 94 (n. 13), 99 (n. 23).

See Co. Lit. sec. 650, p. 345, for the meaning of the words "right, title, and interest," and sec. 465, p. 273, as to the importance of the word "heirs."

I cannot avoid thinking, therefore, that something more was meant by the words "clear deed," than all the right &c., unless it is intended that such right, &c., should be a clear title in fee, for otherwise, undefined as the words "all his right, title, and interest," are, a clear deed thereof could only mean a deed sufficient in form to pass any right, title, or interest he might have, whether a leasehold or freehold interest, without its appearing which, if there was any interest of either kind. I do not feel at liberty to attach any such vague or restricted meaning to the emphatic word "clear."

A closer or more critical view does not appear to me to alter this construction. Placed where the words "clear deed" are, they, together with the indefinite nature of the terms "all his right, title, and interest," render the word "same" of doubtful relation or import; and under such circumstances, the rule for determining its meaning is to refer it to the last antecedent, unless something in the context requires a deviation from such rule, in deference to the paramount object of applying it according to the intention of the parties. It is said to be a maxim that "*idem semper proximo antecedente refertur.*"—Co. Lit. 20 (b), and 385 (b); 1 Lord Raymond, 407; 2 Lord Raymond, 888 & 1094; Sutton v. Fener, 3 Wil. 339; 11 East. 593; Rex v. Wright, 1 A. & E. 434; Chapman v. Beecham, 3 Q. B. 723 and 733; Tapsell v. Crosskey, 7 M. & W. 440; Doe d. Sams v. Garlick, 14 M. & W. 707; Esdaile v. Maclean, 15 M. & W. 277.

Now the adjective *same* relates to one of two antecedents—namely, to "right, title, and interest," or to "lot," and the word *lot* is the last or next preceding antecedent. Either of those antecedents might be added to the word "same," so the word "lot" might be substituted for it, and the words "right, title, and interest," might be substituted for the words "the same."

The verb "give up" governs the substantives "right, title and interest," and the verb "give" governs the substantive "deed," in the same case as their immediate objects; the substantive "lot" is governed by the prepositions "in and to," which connect it with the previous words "right, title, and interest," of which "lot" is the object or subject. The relative adjective "same" is governed by the preposition "of," which connects it with some antecedent which is the object or subject of the words "clear deed." The words "and give a clear deed of," might have immediately preceded or followed the words "in and to," as doth hereby give up all right, title, and interest in and to, and to give a clear deed of lot No. 45, &c., in which event there could be no doubt of their meaning, or they might, with the words "agree to give"—substituted for the words "give up," have preceded the words "all his right,

title, and interest." Had the agreement been to give a deed of assignment, release, or quit claim, the word "same" might then, from the nature of such deed, be understood as referring to right, title, and interest, though not necessarily; and had it been to give up possession, it would plainly have related to the lot. Had any distinct portion of the lot, or any specific interest or estate therein, been stated after the words "right, title, and interest"—as one fourth, an undivided half, or a term of years, for life or lives—doubtless the word "same" would have had relation thereto; but to make supposed cases of that kind analogous, they ought to be always preceded by the words "all his right, title, and interest," as all his right, &c., in and to one quarter or one half, or the residue of his term, or the estate for life or lives, of the lot, when the same question as at present would arise—namely, whether the word "same" related to quarter, half, the term for years, or life-estate, or only to his right, title, or interest thereto. The words "right, title, and interest," and "clear deed" point to some other object as necessary to give sense or meaning to them; that object I take to be the *corpus* or subject matter—namely, lot No. 45. All his right, title, and interest thereto are indefinite expressions; the meaning of a clear deed thereof is equally obscure, but a clear deed of the lot is perfectly intelligible, and this is synonymous with clear title to the land, which is the language of the breach in the declaration, If a deed of all the right, title and interest, (without defining it) was intended, I can perceive no meaning or value in the word "clear." The ancestor might, in that event, better have agreed in so many words to give a deed of all his right, &c., but he did more—he, in terms first for himself and heirs, gave up all his right, &c., in and to the lot, and then further agreed to give a clear deed of the same—or of it (the lot) not of them (the right, title, and interest),

Therefore, whether the agreement be construed grammatically or according to its spirit with a view to the intention of the parties, it appears to me the words "of the same," relate to the lot, according to the general rule of legal reference being the next antecedent, and that such

rule ought not to be deviated from in this case, as it only could be, in conformity with the apparent intention. I think the intention is best fulfilled by an adherence to the rule, and that consequently there is no longer any uncertainty respecting the meaning or application of the words "clear deed," and that the breach is not too large in alleging the failure of the defendant's ancestor to make a clear deed of the land. This seems to me the only correct conclusion, unless the rules of construction on which I rely are reversed, and the words of the covenant are to be construed most strongly in his favor, instead of against him, and then the relative applied to the more remote instead of the nearest antecedent, in order to give effect to such most favorable construction.

The plaintiff having added to the breach, a denial that the defendant, since his ancestor's death, had made a clear deed of the land, cannot invalidate the previous breach; if admissible, it may be rejected as surplusage, and a sufficient breach will still remain.—*Tempest v. Kilner*, 2 C. B. 300.

I think, therefore, the rule should be made absolute for judgment *non obstante*.

McLEAN, J.—The declaration in this case contains only one count on a covenant contained in a deed of John Phelan to the plaintiff—whereby, as it is alleged, the said John Phelan in his lifetime, for the consideration therein mentioned, did, for himself, his heirs, executors, administrators and assigns, give up unto the plaintiff all the right, title, and interest of him the said John Phelan in and to lot No. 45 in the first concession North Easthope, in the Huron tract. The declaration further alleges—that it is for a breach of this covenant the action is brought—that John Phelan, deceased "did thereby, for himself and his heirs, covenant and agree to and with the said plaintiff, to give him a clear deed of the same." The breach assigned is—that the said John Phelan in his lifetime, and the defendant as heir-at-law of the said John Phelan since his death, although often requested, did not and would not give to the plaintiff a clear deed of the said land, according to the

said covenant, but to do the same wholly neglected and refused, and the defendant still neglects and refuses, contrary to the tenor and effect, true intent and meaning of the said covenant.

The defendant craves oyer of the deed, and sets it out as follows, so far as it relates to the land :

“ Memorandum of an agreement made and entered into, this 28th day of September, A. D. 1842, between John Phelan, senior, of the township of North Easthope, in the Huron tract, farmer, of the one part, and James Phelan, of the same place, farmer, of the other part. Now the condition of this agreement is such—the said John Phelan doth hereby for himself, his heirs, executors, administrators, and assigns, give up unto the said James Phelan all his right, title, and interest in and to lot 45 in the first concession of the township of North Easthope, in the Huron tract, and to give him a clear deed of the same ; the deed also transfers some personal property, and then it contains a covenant on the part of James Phelan (the plaintiff), for himself, his heirs, executors, administrators, and assigns, for and in consideration of the above deed and articles, to pay unto the said John Phelan, his heirs or assigns, the sum of 250*l*. currency, in manner therein mentioned, and also to allow the said John Phelan the use of the dwelling-house in which he then resided, and four acres of land between the said house and the concession or side road, during the lifetime of the said John Phelan.

Pleas :—1st. That the deed being read and heard, the said supposed deed is not the deed of the said John Phelan, deceased.

2nd. That defendant did not pay to John Phelan in his lifetime, or to any person since his death, the sum of 250*l*., in manner and at the times appointed by the said deed for the payment of the same, being the consideration for which the said deed was to be made.

3rd. The plaintiff never tendered to John Phelan, or to the defendant, as his heir-at-law since his death, a deed of the said land for execution, according to the tenor of the said recited deed, although the said John Phelan in his lifetime,

and the defendant since his death, have been always ready and willing, and offered to execute and deliver such deed as aforesaid.

Replications.—As to first plea of *non est factum*: Issue.

To 2nd plea: That plaintiff was always ready and willing to pay to John Phelan in his lifetime, and to defendant since his death, the said sum in the plea mentioned, in manner and at the times appointed by the said deed.

To 3rd plea: That a deed was tendered for execution to John Phelan in his lifetime, and to defendant as heir-at-law since his death, and that they respectively refused to execute the same.

At the last Autumn Assizes in and for the county of Oxford, a verdict was rendered for the plaintiff, and 400*l.* damages on the first issue, and for the defendant on the other two issues; and in last Michaelmas term the plaintiff moved for leave to enter judgment on the second and third issues on the record, notwithstanding the verdict of the jury on the said issues in favor of the defendant, or that a repleader may be awarded.

On the argument, the defendant's counsel admitted the pleas to be bad and immaterial, and that plaintiff would be entitled to judgment *non obstante*, if the declaration were good; but he contended that the pleas confess a cause of action and do not avoid it; the declaration does not shew sufficiently a cause of action which could be confessed and avoided; that the breach assigned is larger than the covenant contained in the deed; that the words in the covenant are ambiguous, inasmuch as the meaning of the words "a clear deed" are uncertain, and the kind of deed to be given cannot be gathered from the instrument; that the plaintiff cannot be entitled to judgment *non obstante*, on a declaration which on the face of it does not shew a good cause of action, and on which therefore judgment must be arrested.

The plaintiff, on the other hand, contended that the only question on this motion before the court was, whether, in fact, the issues were or were not immaterial; that if material, then the plaintiff is entitled to judgment *non obstante*,

unless a motion has been made in proper time to arrest the judgment, on the ground of the insufficiency of the declaration.

It is admitted by defendant, that if the declaration cannot be impeached, the issues being on the face of the record immaterial, the plaintiff is entitled to succeed. Unless the defendant can be admitted to shew on this motion for judgment *non obstante* that the declaration is bad, it is too late to move in arrest of judgment, and the plaintiff must have judgment.—Harris v. Goodwyn, 2 M. & G. 406.

The second and third pleas, which set up as matters of defence, the non-payment of the consideration of 250*l.* by the plaintiff, and that the plaintiff did not make out and tender a deed for the land, to be executed by John Phelan in his lifetime, or by the defendant since his death, are pleaded as if the payment of the money and the tendering a deed for execution were conditions precedent, the non-performance of which by the plaintiff, would excuse the late John Phelan while living, and the defendant as his heir-at-law, from giving a *clear deed*, according to the terms of the covenant; but on looking at this instrument, it is obvious that they are not conditions precedent, and that the giving of a clear deed is an independent covenant, to be performed by John Phelan, or by the defendant since his death, as his heir-at-law. The jury have found that the plaintiff was not in fact ready and willing to pay to John Phelan during his lifetime, and to defendant since his death, the sum in the plea mentioned, in manner and at the times appointed by the deed, and that no deed was tendered for execution—but these were issues which could not affect the plaintiff's right to recover on the covenant of the ancestor to give a *clear deed*. So far then as these issues are in question, the plaintiff is entitled to judgment, notwithstanding the finding of the jury upon them; but as he cannot enter his judgment without leave of the court, and he has made application for that purpose, it becomes necessary for the court to see whether on the whole record, he is entitled to such judgment. If the breach assigned is larger than the covenant will warrant, then the declaration

must be bad on that account ; or, if the covenant is so vague and uncertain in its terms that no specific or certain meaning can be given to it, the plaintiff cannot maintain this action upon it.

The plaintiff assigns as a breach of the covenant, that John Phelan in his lifetime, and the defendant as heir-at-law since his death, although often requested, did not and would not give to the plaintiff *a clear deed of the said land*, according to the said covenant, but wholly neglected and refused to do so, contrary to the *tenor and effect, true intent and meaning* of the said covenant. To this breach the defendant does not demur on the ground of its being larger than the covenant, but he pleads over with a view of excusing its non-performance, and thereby admits the construction placed upon it by the plaintiff ; he now, however, alleges that such construction is not correct, and that instead of the covenant being to give a clear deed of the land, it must be regarded as a covenant to give a clear deed of all the right, title, and interest of John Phelan in the land, whatever that may have been. If the late John Phelan was in fact seised in fee of the land, then the covenant would in effect be to give a *clear deed* of the *freehold* to the plaintiff, under the name of all the right, title, and interest of John Phelan in the land ; but if the covenant must be considered as only binding John Phelan and his heirs to give a clear deed of all the *right, title, and interest*, and such right, title, and interest does not appear, the breach assigned in this action does not correspond with the covenant, and the plaintiff cannot have judgment. By the deed, all the right, title, and interest of John Phelan in and to lot 45 in the first concession North Easthope is expressly given up to the plaintiff, and the grantor then covenants to do something more in reference to the premises—that is, to give the plaintiff a *clear deed* of the same ; he had, by his deed, given up all his right, title, and interest to the plaintiff in the lot, and he bound himself to give him a clear deed of it—that is to say, such a deed as should be clear as a conveyance of the lot to the plaintiff, and such as should entitle the plaintiff to hold it subsequently clear of

incumbrances. From the terms used, if it can be supposed that the person who wrote the deed used them advisedly and was aware of their import, it might be inferred that the lot was at the time subject to some incumbrance which was subsequently to be removed; that John Phelan, under such circumstances, gave up all his right, title, and interest in it, and agreed—in consideration of 250*l.* and being allowed to occupy for life the house in which he lived and four acres of ground—at some future period to make a clear deed of the lot to the plaintiff, or a deed clear of any incumbrances to which it was then subject. Whatever may have been the motive for the covenant to give a *clear deed* to the plaintiff at some future period, I think the intention of the parties is sufficiently obvious—that the *clear deed* was not to be merely the same as that which was then executed, and to operate only as a conveyance of all the right, title, and interest of John Phelan in the lot, it was evidently intended to be something more, and to be a deed of greater effect and weight.

The fact that John Phelan gave up all his right, title, and interest in the whole lot, and that it was stipulated that, as a part of the consideration for his doing so, the plaintiff and his heirs were to *allow him* the use of the dwelling-house and four acres of land during his lifetime, shews too, I think, that John Phelan had more than a life-estate in the land—for if he had only a life-estate, there could be no sense in his assigning to the plaintiff the house and the four acres of land, which he was at all events to enjoy during his lifetime, and then holding the premises by the sufferance of the plaintiff. If then, it may be fairly assumed from this, that the defendant's ancestor had a higher interest in the land, and one which would descend to his heir—an inference strengthened by the fact that for himself and his heirs he gave up all his right, title, and interest, and agreed to give him a clear deed—that interest must, I think, be taken to be a seizin in fee.

If John Phelan had died seized of the lot in question, the presumption in law would be that he was seized in fee—so, being in possession of the lot and assigning all his right,

title, and interest, and covenanting to give a clear deed, the presumption, as it appears to me, equally arises, that he was in possession owning the land in fee, and that the clear deed to be given was to convey the same in fee to the plaintiff.

The deed is somewhat ambiguously expressed, but I think not so much so that the intention of the parties cannot be ascertained from it; and as it appears to me that according to its fair construction, it must be regarded as containing a covenant to give a clear deed of the land in question, and not merely of the uncertain interest in it of John Phelan, and the breach of that covenant is sufficiently stated and not denied on the record, and as the only material plea has been found for the plaintiff, and judgment may be given in his favor on the whole record, I am of opinion that he is entitled to such judgment.

SULLIVAN, J.—The only doubt I have had in this case was regarding the construction of the covenant on which the action is brought. The breach assigned is equivalent to an allegation that the defendant's ancestor did not make to the plaintiff a conveyance of the land in fee simple; and unless the covenant bound the defendant's ancestor to make such a conveyance, the declaration is bad in substance, and I think it clear that judgment in favour of the plaintiff, *non obstante veredicto*, could not be founded upon it.

Whether the covenant is or is not for a conveyance of the fee simple, depends upon the application of the maxim—“*Ad proximum antecedens fiat relatio, nisi impediatur sententia.*”

The covenantor in this case, by the instrument on which the action is brought, professes to give up to the plaintiff all his (the covenantor's) right, title, and interest in and to the lot of land in question, and, as it seems to me, covenants to make him, the plaintiff, a clear deed of the same. Whether the words of release or relinquishment have any effect as a conveyance, depends upon circumstances *dehors* the instrument, of which we are not informed. The only effect that they could have as a conveyance, would be that of a release to the plaintiff, supposing him to have been in

possession of some estate already, either by right or wrong. The words "and to give him a clear deed of the same," constitute a covenant to make a conveyance free from incumbrances of something; what that is depends upon the relation of the word *same*. If *same* relates to the right, title and interest of the plaintiff, then there is no breach assigned in the declaration before us; if it relate to the land, or to lot 45, then the breach is assigned with sufficient certainty, being in the words of the covenant, and meaning that a conveyance or deed in fee simple was not made of the land.

It is perfectly clear, from numerous authorities, that the word *same*, or *idem*, as a relative adjective or pronoun, especially refers to the next antecedent, and this more pointedly or decidedly than other words of reference, such as *said* or *aforsaid*. If this were all the difficulty, it would admit of easy solution; but the question here is, what is the next antecedent? Is it the right, title, and interest in the land, or is it the land? I have looked in vain at the instrument set out in the declaration, to find any intention of the parties which would lead me to make the word *same* refer to one part of the precedent matter rather than to another, or than to the whole; there is nothing beyond the mere words of the covenant, as I have stated them, to shew whether the covenantor intended to undertake merely to convey all his interest, whatever it might be, or whether he meant to covenant to make an absolute title in fee simple to the land. Every word in the instrument declared upon, is as consistent with the covenantor having an estate less than fee simple in the land, as with his having the absolute fee. I think therefore that I am driven to apply the rule or maxim without reference to the exception, "*nisi impediatur sententia*," for I do not see that the strict construction, whatever it may be, can impair the meaning of the whole covenant or instrument in question, as in the case of *Doe Spencer v. Goodwin*, 4 M. & S. 405.

The intention of the parties is not so shewn, as to enable the court satisfactorily to admit or reject anything beyond or out of the words used.

According to strict grammatical and legal construction, upon the best consideration I can give this case, I have come to the conclusion, that the next antecedent to the word *same* is the right, title and interest of the covenantor in the land, and not the land itself. This is not contrary to the probable meaning of the parties ; for it may be, for aught we know, that the whole title and interest, which was the subject of bargain and sale, was a life-estate in the covenantor, if not something less. Supposing, for the sake of argument, that it had been recited that the covenantor had a life-estate in the land, and that the instrument produced in the terms we have now before us—I think the sense and meaning of the parties apparent from that fact—would shew, even against strict grammatical construction, that the estate so mentioned was the subject of the bargain and the covenant, and not any supposed or presumed fee simple estate. In the absence of this recital, I think I have no right to presume any estate larger than the terms of the covenant demand. Then what does the covenantor give up ? It is all his estate in the land. This is not two things, but one thing ; it is not his estate and the fee simple besides. Then there being but one thing—namely, the estate in the land, and a covenant to give a clear deed of the same—I do not see what the relative *same* can have relation to, but to the one thing preceding. Had the antecedent subject of the release or relinquishment been an undivided moiety of the land, the word *same* must relate to that ; had the same subject been the timber, the use of the water, a right of way, or any other defined interest in the land, the word *same* must I think have been held to relate to that ; and surely, it is not because that interest and estate is undefined, that relation can be had to anything else than the estate. Strictly speaking, the *land*, the lot, to undertake to make *a deed of which* would be held to be an undertaking to convey it, *i. e.* the land, in fee simple, is not mentioned at all in the instrument before us. It is only the estate of the covenantor in it that is mentioned—as if a person say, “I bought a quarter of an ox, and I am to give a pound for the same,” he can only be said to have

mentioned the quarter, not the whole ; and the quarter is the antecedent to the relative *same*, and the price belongs to that antecedent,

It is suggested by the learned Chief Justice that the word *lot*, and the relative *same*, are in this instrument governed by prepositions of nearly the same import, and that the sentence may be read as if there were no division in it—thus, “I agree to give up my estate, right, and title, and a free deed of, in and to lot 45.” If such a reading were necessary to make sense of the instrument, I should not object, but it seems to me not warranted by any such necessity. The estate, right, or title, is as capable of being made the subject of a conveyance by deed as the land, or the fee simple. If the covenantor really had the fee, then the effect of the instrument would be that which the plaintiff desires to give it ; but it seems to me that this fact, what the estate was, should be made to appear in pleading, before the present breach is warranted.

In Viner’s Abridgment, 16, title Parols, E. pl. 1. is the following decision :—“ If A. be bound by an obligation, whereof the condition is, that he and B. his wife will levy a fine of land to C. and D., and at their costs and charges, this word *and* makes a new sentence, and so the obligor, is bound to do two things—*scilicet*, to levy a fine, and to levy it at his own costs and charges, and not at the cost of the conusees, and so those words do not relate to the next antecedent.

Pl. 4, same title :—If obligation be made on 23rd May, for payment of money upon *24th of May* next ensuing—this does not refer to the month, but to the day, properly and of itself, without finding of the intent of the parties.—Cro. Jac. 646, 670.

See also pl. 5, 6, 7 : pl. 9 seems to have been reported as decided both ways.

Pl. 14 ; *Nuper obiit* in A. B. and C. in the Isle of P—— The tenant said that no such Vill as A. & B. in the —— Isle : *et non allocatur* for Isle shall not have relation but to the last Vill ; but Brook says *quod mirum*.

Pl. 17 is rather the other way.

Pl. 18 : Debt of 20*l.* by obligation, which was that the obligee shall receive 5*l.* by the hands of A. when K. comes to his house, and at Michaelmas then next following 5*l.* The *then next following* was held to refer the date of the obligation, and not to K.'s coming to the house.—See also pl. 27.

So far as these cases go, it seems to me that the true doctrine as to the antecedent of the relative is this, that the next antecedent is the next thing previously mentioned, which is the true subject of the previous sentence, or part of the sentence, and not the thing of which the true subject is but a part, or which has been introduced into the sentence for the purpose of describing or limiting the word which is the true subject of the discourse ; as in the present case, *all his estate* in lot 45—it is not *lot 45*, but *all his estate*, which is treated of. Then, unless the sense requires a different construction, all his estate is the next antecedent to a succeeding relative. Of the modern cases that I have seen, there are none of them that throw much light upon this point. They establish that the word *same*, or *idem*, refers more strictly to the next antecedent than *said* or *aforesaid*—*prædictus*. The two following are, however, worth considering attentively, because, at least so far as I know, they are the only ones which bear even slightly upon the point of fixing the antecedent of a relative, in the absence of any direction from the sense of the passage.

Brancker v. Molyneux, 1 M. & G. 710 : In this case the plaintiffs new assigned, and said the action was brought, not for the supposed conversion of the plea mentioned, but for that the defendant had converted *divers bales of cotton of plaintiff's* different to and other than the bales in the plea mentioned ; and also had converted and disposed of the *last mentioned bales* on other and different times, &c., than in the plea mentioned. The question came up in argument, to what bales the words *last mentioned* referred—whether to the bales mentioned in the new assignment, or to those mentioned in the plea ; and the court held, that on account of the sense, they refer to the latter, *Tindal, C. J.*

saying, "but though, in strict grammatical construction, these words would refer to the 304 bales to which the first breach of the new assignment replies, I think they may be fairly referred to the 304 bales mentioned in the introductory part of the plea."

Coltman, J., agrees as to the plain and obvious grammatical construction; yet it is to be observed, that looking merely to juxtaposition of words, the relative would have been to the bales in the plea mentioned, yet as they were only introduced for the purpose of shewing that they were not the subject of the new assignment, the words last mentioned were held not grammatically to relate to them.

Ashton v. Brevitt, 14 M. & W. 106, was a special demurrer to a replication for ambiguity. The replication was to the third plea: so far as relates to divers, to wit, seven, tons of the said hay, and divers, to wit, thirty, bushels of the barley, and seven tons weight of the straw, and divers, to wit, two hundred bushels of the turnips, *portions of the goods and chattels in the declaration mentioned*, admitting that the said defendant as the servant of the said William Brevitt, and by his command, converted and disposed of the *said* last mentioned goods and chattels *modo et forma*, yet, &c., the said William Brevitt was not lawfully possessed, &c., of and in the said last mentioned goods and chattels *modo et forma*. On special demurrer for ambiguity, this was held bad, because the said last mentioned goods and chattels might refer to the whole, and not to the portions to which the replication was directed.

This is so decided, merely because it was upon special demurrer, and I am not sure that even so it was rightly decided, but at all events the court seems to have had no doubt as to the meaning they would have placed on the words last mentioned, had there been no special demurrer; and it appears that in that case they would have made them relate to the portions, and not to the whole of the goods. According to the rules regarding certainty to be observed in special pleading, the replication in the case of Ashton v. Brevitt may have been bad for ambiguity, but the question is not whether this covenant is bad for ambi-

guity or uncertainty, but whether a certain meaning is to be attached to it. Perhaps it is void for uncertainty. I am inclined, however, to think that it is not, and that a certain meaning may grammatically and legally be attached to the relative *same*, but it is not the meaning which the plaintiff has attributed to that word.

I have read all that I have been able to find, but I have only cited the few cases that bear directly upon the difficult question in this case; and upon the whole I am unable to arrive at any other conclusion *but* this—namely, that the plaintiff should either have assigned his breach “that the covenantor did not make a clear deed of his estate and interest,” or he should have set out as inducement, what the estate and interest were, and then assigned as a breach, the not making a clear deed of that estate and interest. In this opinion I have the misfortune to differ from the learned Chief Justice and from my brother McLean; and though I have not been able to concur with them, I cannot but feel the great probability of their being in the right.

SULLIVAN, J., dissenting.

Rule absolute.

STOVEL V. ALLEN.

In this action the plaintiff sued for 70*l.* balance of account, and proved himself entitled to 49*l.* 19*s.* 5*d.*

Held, that defendant could not prove payments made on the whole account, and apply the same in reduction of the balance sued for.

At the trial a witness was called, who stated that as agent for the plaintiff he had given defendant certain parcels to deliver, with a memorandum of charges on each parcel, and that defendant had collected many of them and had made payments on account, leaving a balance due plaintiff, for which this action was brought. That witness had had a memorandum book, in which he had entered all the parcels given to the defendant, with the charges against them, and had also credited defendant with the amounts paid; that he had given the memorandum book to the plaintiff, and had since searched among papers left by him with plaintiff's agent for it, but without success. The witness produced a statement made from the memorandum book, and said he recollected the delivery of the parcels, his recollection not depending on the memorandum book, but that he could not speak of the sums except from the memorandum book.

Held, that the non-production of the memorandum book was not sufficiently accounted for, to allow of the secondary evidence given of its contents.

Assumpsit.

Declaration states, that on the 1st June, 1850, defendant was indebted to plaintiff in 70*l.* for goods sold and delivered; work, labor, and material; money lent, paid, had and received, and upon an account stated.

Pleas :—1st. Non-assumpsit.

2nd. Payment of 75*l.* in full discharge and satisfaction of all damages sustained by plaintiff, by reason of the said promises and the non-performance thereof. Traversed by the replication.

3rd. Set-off, 75*l.* Traversed by the replication.

No particulars annexed to the record.

At the trial before McLEAN, J., at the last assizes held in and for the county of York, the plaintiff proved himself entitled to 49*l.* 19*s.* 3*d.* over and above the payments proved by defendant; but defendant contended that he had a right to apply all the payments proved, in reduction of the amount claimed in the declaration, and that the plaintiff could only recover the balance. A verdict was taken for the plaintiff, 9*l.* 15*s.* 3*d.*, with leave to move its increase to 49*l.* 19*s.* 5*d.*, if the plaintiff entitled thereto.

On motion of *Dr. Connor, Q. C.*; a rule nisi was granted, calling on the defendant to shew cause why the verdict should not be increased, pursuant to the leave reserved, to 49*l.* 19*s.* 5*d.*, or why it should not be set aside and a new trial be granted, with leave to the plaintiff to amend the declaration.

Vankoughnet, Q. C., shewed cause, and contended that the evidence on which the plaintiff claims to increase the verdict, was inadmissible—an objection taken at *Nisi Prius*, and now open to renewal.

The only witness was John Tovel, an agent of the plaintiff.

It appeared that the plaintiff was a tailor, residing in London (England); that Tovel, his agent, resided formerly in Montreal and latterly in Toronto, and that the defendant was what is called an “express,” or “express carrier,” in Canada; that the plaintiff was in the habit of transmitting cases of made-up-clothes to the witness, in separate parcels, to be distributed to the respective parties to whom addressed, and that the witness used to entrust the distribution of such parcels to the defendant, to whom a note of charges was also delivered on each parcel, many of which charges he collected; that he paid over to the witness divers sums, for

which receipts were always given, but leaving a balance due, for which this action was brought. The witness represented that he was liable to the plaintiff, as his immediate agent, for the moneys collected by defendant under his (the witness's) authority. The evidence offered to shew the balance still in arrear was to the following effect:—

The witness stated that he had a memorandum book, in which he entered all the parcels delivered to the defendant; that he had delivered it, with all the papers, to the plaintiff in Canada, and has since searched among the papers left by him with Cameron, Brock & Robinson, at this place, but had not found it. He could not say whether it was in the plaintiff's possession or not. No one belonging to the firm or office of Cameron, Brock & Robinson, was called.

The witness produced a statement made from such memorandum book, and said the items therein mentioned had all been acknowledged by the defendant to him, amounting to 110*l.* 4*s.* 2*d.*, besides an overcoat of 8*l.* 2*s.* 4*d.*, in short the defendant admitted receiving items 110*l.* 4*s.* 2*d.*, and with the coat in all 118*l.* 6*s.* 6*d.*, on which he had from time to time made payments amounting to 68*l.* 7*s.* 1*d.*, the last payment being in the summer of 1849.

On cross-examination, he said he recollected the various items mentioned in the statement produced; his recollection not depending upon the memorandum book as to the delivery of parcels, but that he could not speak of the sums except from the memorandum book. He also said the 110*l.* 4*s.* 2*d.*, comprised the whole amount of charges on parcels delivered to defendant, but that he sometimes said that he was obliged to employ agents, and could not tell whether items were received or not: that the defendant's statements of receipts were given from time to time, and that sums were paid in like manner; that the witness entered the sums received in his memorandum book, and credited the parties in his books, and could make up a statement from the ledger, very nearly corresponding with the one produced, of the sums received from defendant.

The defendant's counsel contended that without the production of the memorandum book there was no sufficient

evidence of the amount received by the defendant ; that the bill of particulars was only for 70*l.*, and the declaration for a like sum—not claimed as a balance ; and that the 68*l.* 7*s.* 1*d.*, admitted to have paid by defendant should be deducted therefrom.

A verdict was taken for 9*l.* 15*s.* 3*d.*, the price of the overcoat, with leave to plaintiff to move its increase to 49*l.* 19*s.* 5*d.* if in the opinion of the court, he was entitled to recover that amount on these pleadings, and on the evidence—*Taylor's Evidence*, 303.

Vankoughnet, Q. C., also referred to the particulars of the plaintiff's demand as restricting him to a balance, against which the defendant might apply the payments.

He submitted that the evidence on which it is sought to increase the verdict, was inadmissible on two grounds :

1st. Because the witness, in referring to the copy or extract he had made, could not recollect the sums or charges, showing that his memory was not refreshed.

2nd. That, if the paper was to be itself relied on in aid of the proof, no sufficient search had been made to account for the non-production of the original memorandum book ; and even if there had been, it was not a perfect copy, and therefore inadmissible.

Dr. Connor, Q. C., in reply as to the right to increase the verdict so far as respected the pleadings, cited *Freeman v. Crafts*, 4 M. & W. 4 ; *Alston v. Mills*, 9 A. & E. 248 ; *Jones v. Logan*, 5 Bing. N. S. 653 ; *Moses v. Levy*, 4 Q. B. 213 ; *Ross v. Burton*, 4 U. C. Q. B. 357.

If otherwise, he desired to set aside the verdict with leave to amend.—*Tomlinson v. Blacksmith*, 7 T. R. 132 ; *Tebbs v. Barron*, 4 M. & G. 844.

As to the evidence, he contended the extract was equivalent to an original note, both being made by the witness.—*Burton v. Plummer*, 2 A. & E. 341 ; 2 *Taylor's Ev. s.* 1031.

MACAULAY, C. J.—As to the first point, the cases cited by *Dr. Connor* shew that the plaintiff had a right to prove his whole demand, to counterbalance the payments ; in other words, that the defendant could not restrict the plaintiff's whole demand to 70*l.*, and apply the payments in

reduction thereof, although such payments were in fact made upon general account and towards the satisfaction of a larger demand, which exceeded by 70*l.* the amount of such payments. The particulars are not annexed to the record, and I did not hear anything on the argument to shew that they brought the case within *Eastwick v. Harman*, 6 M. & W. 13, as an action for a balance only, after crediting payments; and, if they did, the plea of payment would have reference to such balance, and must be proved accordingly. A mere bill of particulars claiming 70*l.* as due the plaintiff, without reference to any payments or credits, would not preclude his proving the whole original demand, though exceeding the amount so claimed, merely in order to meet proof of payments which had been applied in reduction or part payment of such demand.

See *Townson v. Jackson*, 13 M. & W. 374; *Lamb v. Mickelthwait*, 1 Q. B. 400, as to the objection raised to the evidence, by which the application to increase the verdict was supported, the plaintiff admitting, or his witness proving, payments to the extent of 68*l.* 7*s.* 1*d.*, it was incumbent on the plaintiff to prove any balance to which he was entitled.—*Price v. Rees*, 11 M. & W. 576.

To do this he relied on the oral evidence of his agent to prove sums admitted to have been received by the defendant, but who could not speak to the sums from memory, or without reference to a copy or extract made by him from original entries, also made by himself in an absent memorandum book, such copy or extract not being made at the same time, but apparently being after the original entries.

The cases are numerous on this subject, and I infer from them :

1st. That the facts do not bring this case within *Burton v. Plummer*, 2 A. & E. 341: there the entry in the ledger seems to have been regarded as contemporaneous with the original entry, a part of one transaction in the course of the clerk's duty in completing the entries in the account books, or as a duplicate entry and equivalent to the original, but it was not so in the present instance.

2nd. That as the witness could not, even on referring to the copy or extract, speak from present memory or recollection, revived by a reference thereto or otherwise existing in his mind, but (as to sums) could only speak from information afforded by the copy, it was necessary to produce or account for the absence of the original entry or other book, rendered more especially important, owing to the witness not having taken an exact copy of the entries in the book in full.

3rd. that the evidence to excuse its non-production was not, under such circumstances, sufficient. It appeared that the book, with all the other papers, had been delivered by the witness to the plaintiff, and that he had left some or all of them with Messrs. Cameron, Brock & Robinson, at whose office search had been made. Had it clearly appeared that the book was left in their possession by the plaintiff, with the papers, I should have been disposed to hold the proof of search sufficient, although no one belonging to the office was called. But I cannot say I think the evidence satisfactory to justify the inference that the book was left with Messrs. Cameron, Brock & Robinson, and had become lost or mislaid in their office.

Per Alderson, B., the search should be such as to induce the judge to come to the conclusion—and the court afterwards, on revising his opinion, to come to the same conclusion—that there is no reason to suppose the omission to produce the document itself arose from any desire to keep it back, and that there has been no reasonable opportunity of producing it which has been neglected.—*Gathercole v. Miall*, 15 M. & W. 335 (a).

Now, considering the importance of this book under the evidence, I do not feel warranted in holding that enough is

(a) *Rex v. St. Martin's Leicester*, 2 A. & E. 210, 215; *Howard v. Cansfield*, 5 Dow. 417; *Jones v. Stroud*, 2 C. & P. 196; *Topham v. McGregor*, 1 C. & K. 320; *Rex v. Inhabitants of Leigh*, 3 T. R. 749, 754, 5 Bevan, 462, 6 C. & F. 628, 630, 645; *Burton v. Plummer*, 2 A. & E. 341, *Taylor's Ev.* 1031, 1034, 1035, Copy; *Wright v. Court et al.* 2 C. & P. 232; *Wood v. Cooper*, 1 C. & K. 646, 25 How. St. Tr. 937; *Steinkeller v. Newton*, 9 C. & P. 313, 1 Lev. C. C. 101, 20 How. St. Tr. 619, 28 How. St. Tr. 1367, 1 Star Ev. 177-8; *Solomons v. Campbell*, 24 St. Tr. 824; *Sinclair v. Stevenson*, 1 C. & P. 583, 2 Young & Coll. Ch. R. 341; *Gregory v. Tavernor*, 6 C. & P. 281.

shewn to warrant the conclusion, that there has been no reasonable opportunity of producing it that has been neglected, although (so far as the plaintiff is concerned) I perceive no good reason to apprehend that the omission arose from any desire to keep it back. It may be all the time in the plaintiff's possession in London, and he may not have been apprised of the necessity for its production. On this ground, therefore, it seems to me the most correct course, not to grant the increase of the verdict, as not being sufficiently sustained by legal proof (a).

It is true that the defendant files no affidavit denying the justness of the demand, but in the course of the proceedings have taken he has not had an opportunity to do so according to the rules of practice. Had the verdict been for the plaintiff, and the defendant been obliged to move against it, it would have been otherwise.

At the same time the rule may be made absolute to set aside the verdict without costs, if the plaintiff wishes it, on the first ground, in which I think there was misdirection, and which was the main one on which the defendant's counsel relied at *Nisi Prius*.

Note.—McLean, J., thought a new trial should only be on payment of costs, but Macaulay, C. J., and Sullivan, J., thought without costs.

If the verdict had been entered for the plaintiff for the full amount, as it would have been were it not for the other objection (that is to the pleadings) and the sum claimed in the declaration, the defendant must have moved against it, and a new trial would have been granted without costs. At *Nisi Prius* the learned Judge did not rule against the plaintiff on the evidence, but would have left it to the jury; and as it was, the plaintiff's right to recover, seems to have been conceded *sub modo*—i. e., provided the defendant had not a right to apply the payments in reduction of the 70*l.* claimed in the declaration, in which event the plaintiff would still have been entitled to a verdict. As it is, he (the plaintiff) has the verdict, though for a less sum—that verdict he must waive, whereby the defendant has the benefit of a new trial in toto, without costs. Payment of costs should not depend upon the mere difference of the course taken at *Nisi Prius*, in omitting the sum in question out of, instead of including it in the verdict, and under the circumstances, it seems the proper course now to place the parties in *statu quo*. Upon the point reserved at *Nisi Prius*, taken alone, the verdict would be increased, and then the defendant would be obliged to move against it for want of sufficient evidence, when the verdict would be set aside without costs; and such seems the most correct result as matters have turned out.

(a) *Minshall v. Lloyd*, 2 M. & W. 450; *McCahey v. Alston*, 2 M. & W. 205, 212; *Pardoe v. Price*, 13 M. & W. 267, 3 N. S. 196; *Rex v. Inhabitants of Stourbridge*, 8 B. & C. 96, 2 M. & R. 43; *Gulley v. The Bishop of Exeter*, 4 Bing. 293, 3 B. & A. 296; *Freeman v. Arkell*, 2 B. & C. 494, 3 D. & R. 669; *Kensington v. Inglis*, 8 East. 273.

McLEAN, J.—I had doubts in this case at the trial, whether the plaintiff, having declared for 70*l.*, and the defendant having pleaded payment and proved a payment of upwards of 68*l.*, could recover more than the difference between the amount declared for and that proved to have been paid, but the case of *Freeman v. Crafts*, 4 M. & W. 4, and other cases have removed such doubts, and I now think the plaintiff was entitled to recover any balance which he proved to be due by the defendant beyond the 68*l.* The defendant's plea of payment must be taken to mean that the defendant has paid the moneys which the plaintiff seeks to recover, and as it appears that there were various sums beyond the payments made by defendant, the plaintiff may recover them without any new assignment or amendment of his declaration.

The witness who proved the plaintiff's demand, could not speak from his own knowledge of the items, and was obliged to have recourse to a memorandum, which he had taken from a book in which he had made various entries of sums acknowledged by the defendant to have been received for the plaintiff; that book was not produced, and the necessity for its production was shewn by the plaintiff's counsel on the trial attempting to account for it. The witness stated that he had given it to the plaintiff, and that search had been made amongst the papers left by plaintiff with Messrs. Cameron, Brock & Robinson, his agents, and that it could not be found there. It was not, however, shewn that the book in question had been left there, and for aught that appeared, it may still be in plaintiff's possession, and not left with the other papers in the hands of plaintiff's agents. That book, containing the original entries, was certainly the best evidence of its contents, and as the witness could not speak as to sums, except from its contents, I think it should be produced in order that the defendant might have the opportunity of cross-questioning the witness on the subject. The objection, though taken at the trial, was not very strenuously urged, but being pressed on the argument on the rule to increase the verdict, it seems to me entitled to prevail, unless indeed the plaintiff

is content to retain the verdict for the amount proved, without reference to the memorandum book.

SULLIVAN, J.—The first question, whether a plaintiff proving a demand in *assumpsit* or debt, and the defendant under a plea of payment shewing a payment beyond that demand, is at liberty to prove a further demand to meet the payments proved, beyond the amount appearing to be claimed in the declaration, is answered by the case of *Freeman v. Crafts*, 4 M. & W. 4, which appears to me directly in point; also *Ferguson v. Mahon*, 9 Ad. & El. 245; *James v. Lingham*, 5 B. N. C. 553; *Moses v. Levy*, 4 Q. B. 212. The case of *Ross et al. v. Burton*, 4 U. C. R. 357, is not opposed to the view taken by these authorities. The plea in that case being special, as well as the declaration. The fact of particulars of demand having been given in this case, can make no distinction in the defendant's favour, unless he can prove that the sums paid by him were specially applied on account of the particulars demanded.—See *Townsend v. Jackson*, 13 M. & W. 374. It seems to me that on the other point, regarding the right to examine a witness, he using a book containing extracts from an original book kept by him, which extracts were not made at, or nearly about the time of making the original entries, and which extracts do not enable the witness to state facts from his own memory, to the extent necessary to make his testimony available, there can be no doubt the case of *Burton v. Plummer*, 2 Ad. & El. 341, while it shews an exceptional case—that is to say, of a ledger being used by a witness to prove entries, which were compiled from a waste-book nearly about the same time of the waste-book entries, when the original transactions were fresh in the memory of the witness—proves incontestibly that the book used in this case should not have been allowed. The value of the testimony depended upon the fact of the entries being made in the original book, and not upon any memory of the witness, either at the time of giving his evidence or at the time of making the extracts. It follows, therefore, that the court and jury should have the best evidence of the contents of the original book; that evidence would have been its pro-

duction; or if secondary evidence were admissible, it could only have been upon proof of the loss or destruction of the original; and I think it is clear that in this case neither were sufficiently proved.

The plaintiff's application to increase the verdict cannot therefore prevail; but as the amount of the verdict bears no relation to its probable amount in case the plaintiff had been permitted, with such legal evidence as he had, to meet the payments proved by the defendant, I think that the justice of the case requires a new trial without costs.

Per Cur.—Rule absolute for new trial without costs.

BLOOMLEY V. GRINTON & WATKINS.

One of two defendants having admitted to a witness called by the plaintiff, that there was a balance of 203*l.* 15*s.* due to the plaintiff, from which was to be deducted an unascertained debt due to the other defendant, and also a balance on a certain sum due by the plaintiff to his brother, which he had agreed should be paid by the defendants out of the moneys coming to the plaintiff: *Held*, not sufficient evidence to support a count upon an account stated.

Assumpsit. 1st count special: In consideration that plaintiff would sell and assign to defendants certain goods and chattels—to wit, saw-logs, mill-castings, &c., and his chattel interest in a mill then in defendants' possession—defendants promised to deliver within a reasonable time to plaintiff sawed lumber of equal value, &c. Plaintiff then avers performance on his part, and a special request and readiness, &c.; and assigns for breach non-performance on defendant's part.

2nd count: an account stated.

1st. plea: Non-assumpsit to both counts.

2nd—to 1st count: Non-performance on plaintiff's part.

On the trial of this cause, before Mr. Justice Draper, at the autumn assizes, 1850, held in and for the county of Oxford, it appeared in evidence that the plaintiff had contracted with one Showers for the purchase of the mill mentioned in the first count, and had received a bond for a deed from him; that while in possession of such mill the plaintiff contracted a debt with the defendant Grinton for divers goods, sold and delivered, &c.; that, becoming embarrassed, the plaintiff sold his interest, stock, &c., to the

defendants jointly—an arrangement acceded to by Showers, whose contract with the plaintiff was cancelled, and the defendants substituted as purchasers of the mill, and to whom Showers gave another bond for a deed, dated 5th of December, 1849; that the mill was afterwards burnt and rebuilt by the defendants; that out of the amount to be paid by the defendants to the plaintiff, it was agreed that a debt which he owed a brother of his should be deducted and paid by the defendants, and that a part of it, though not the whole, had been paid by them before this action was brought. It was also further agreed that the defendants should, out of the balance, pay the plaintiff's debt to the defendant Grinton, which had not been done; and the plaintiff complained that he (Grinton) neglected and refused to deliver his account, in order that the amount coming to him the (plaintiff), after deducting the same, might be ascertained. It was proved that afterwards the defendant Watkins admitted, in presence of a witness of the plaintiff, that there was a balance of 203*l.* 15*s.* remaining, from which was to be deducted the amount of Grinton's unascertained account and a balance still due plaintiff's brother. The plaintiff failed entirely to support the first count, but contended the evidence was sufficient to go to the jury in support of the 2nd count; and the learned judge, with much hesitation and doubt, left it to them. They found for the plaintiff 203*l.* 15*s.* damages.

Read, for defendants, obtained a rule calling on the plaintiff to shew cause why such verdict should not be set aside as contrary to law, evidence, the weight of evidence, the judge's charge, and for misdirection; principally on the ground that there was no sufficient evidence of an account stated.

John Wilson shewed cause during the same term, and contended that there was sufficient evidence of an account stated, inasmuch as the defendant Watkins unequivocally admitted the sum of 203*l.* 15*s.* to remain due to the plaintiff, claiming only a right to deduct thereout the amount due by the plaintiff to Grinton, and which therefore the defendant Grinton ought to prove; because, in the absence of any such proof, the jury might infer that nothing was due—at

all events, that the defendants did not wish to avail themselves of it in this action, even if they could do so without actually satisfying the debt; that the plaintiff had no means of compelling Grinton to furnish his account; and as he had proved a good *prima facie* case, the onus was on the defendants to repel it; that at best it was mere matter of conventional set-off, and the defendant Grinton had his remedy by cross action.

Read, for defendants, contended the original transaction was not an account stated, but an executory contract special on both sides, and that there was therefore no promise implied in law to pay on request, but a special promise to pay the balance after satisfaction of the debts due to plaintiff's brother and the defendant Grinton. That a subsequent conversation with a stranger was not accounting with the plaintiff; nor did it afford evidence as by admission, that there had been a former accounting; that it related evidently to the original arrangement; and the admission made of the amount to be paid or accounted for to the plaintiff, was accompanied with a reservation in favour of Grinton, which deprived it of all force, as admitting a specific balance due, without which the second count could not be supported; that it was rendered the more uncertain what the plaintiff was really entitled to, owing to the partial payment made to plaintiff's brother, the amount of which was not stated.—*Hopkins v. Logan*, 5 M. & W. 241; *Breckon v. Smith*, 1 A. & E. 488, lb. 667; 1 Mood Rob. 253; *Kennedy v. Withers*, 3 B. & Adol. 769; *Bishop v. Chambre*, 3 C. & P. 55, 1 M. & M., S. C. 2 Jurist, 1066; *Evans v. Davies*, 4 A. & E. 840; *Finlason's Leading Cases*, 1 and notes; *Best on Ev.* 400; *Bates v. Townley*, 12 Ju. 607; *Baynham v. Holt*, 8 Ju. 963; *Arthur v. Dantch*, 9 Ju. 118; *Ashby v. Ashby*, 3 M. & P. 186; *Rigby v. Jeffreys*, 7 Dow. 561; *Tar buck v. Bispham*, 2 M. & W. 6; *Nowhall v. Holt*, 6 M. & W. 662; *Lubbock v. Tribe*, 3 M. & W. 612.

MACAULAY, C. J.—An account stated *ex vi termini* imports a mutual settlement of accounts and a debt due; and the cases, I think, shew that a balance due upon an account stated, may be proved expressly by a settlement, or by

the admission of the party to be charged, made to the plaintiff either in writing or personally, or even by admission to a stranger; and in which event it is, like other admissions, evidence of an accounting retrospectively, though not constituting in itself an account stated; an account should be with the party or authorized agent (*Tarbuck v. Bispham*, 2 M. & W. 2); admissions to third persons may afford evidence of such an accounting having taken place, but then the debt must be unequivocally admitted, and some specific amount acknowledged to be due. The mere admission of the balance remaining on one part of a transaction or agreement, to be reduced by deductions concurrently agreed to be made as another part of such transaction or agreement, such deduction not being ascertained or admitted in point of amount, (which is the present case), do not admit any specific sum as presently due, so as to amount to evidence of an account stated, either at that time or at any prior period; such admission only shews a liability to account, or a state of accounts unadjusted. Nor would proof of the amount of the counter claim to be deducted, shew an admitted balance of the residue sufficient to support the count on an account stated.

In *Hughes v. Thorpe*, 5 M. & W. 667, Parke, B., says: "In order to constitute an account stated, there must be a statement of some certain amount of money being due, which must be made either to the party himself or to some agent of his." A conditional or equivocal admission will not create an engagement express or implied, to pay on request—*Calvert v. Baker*, 4 M. & W. 417; nor if no specific subsisting debt be admitted.—*Burgh v. Legge*, 5 M. & W. 418; *Irving v. Veitch*, 3 M. & W. 90.

The cases on this subject are numerous, and not all quite consistent; many of them are mentioned and discussed in *Finlason's Leading Cases*, in the notes to *Egles v. Vale*, 3 Crok. 69, p. 1, and sequel. Referring to those cited by the counsel for the defendants, and other cases noted above, I do not find that we are authorized in holding the evidence given on the present occasion, sufficient to support the verdict. The plaintiff should proceed on the original agree-

ment, or prove something more specific, to entitle him to dispense therewith and to recover on the account stated, which count evidently does not relate to the original transaction, but to something *ex post facto*.

The rule should therefore be made absolute for a new trial without costs.

McLEAN, J., and SULLIVAN, J., concurred.

GREEN V. BURTCH.

An assignment of a right to real estate executed under seal by the defendant only, in which the consideration money is acknowledged to have been paid, will not support an action for the purchase money, nor be received as proof of an original executory agreement in writing for the sale of the premises; nor will subsequent admissions of defendant's liability supply the place of written proof or of an account stated, unless some specific amount be acknowledged.

Semble: An admission made casually to a stranger, and not to the plaintiff or an agent of his, is not in itself an accounting or statement sufficient to sustain an action on the account stated.

The 1st count of the declaration states that the plaintiff, at the request of the defendant, did bargain, sell and assign to the said defendant a certain messuage and premises, being the north half of No. 2, 1st concession or fourth range east of the Mount Pleasant Road in the Township of Brantford, for the price or sum of 37*l.* 10*s.* to be paid to the plaintiff by the defendant.

2nd count states that the defendant was indebted to the plaintiff in 37*l.* 10*s.* for a certain other messuage, tenement, and premises of the plaintiff, before that time bargained, sold, and assigned by the plaintiff to the defendant, at his request; and in 50*l.* for money found to be due from the defendant to the plaintiff on an account stated between them; and thereupon the defendant in consideration of the premises respectively promised to pay the said several sums of money to the plaintiff, yet the defendant had not paid any of them, or any part thereof, &c.

Pleas:—1st. Non assumpsit. 2nd. Set off.

The case was tried before Mr. Justice Draper, at the Autumn assizes, 1850, held in and for the united counties of Wentworth and Halton, where the plaintiff proved first an assignment under seal from William Syars to Israel Fairchild in consideration of 32*l.* 10*s.* of all his right, title, and interest, &c., of, in, and to the north half of 2 in the

4th range of lots east of the road leading from Brantford to Long Point, or in the gore between the Burtch and Baitman lines, dated the 28th June, 1848.

2nd. Indorsed thereon an assignment from the said Fairchild to the plaintiff, of all his right, title, interest, and claim, &c., to the said half lot, dated the 13th September, 1848; no consideration is mentioned.

3rd. That the plaintiff had a presumptive right to the said half lot, and on the 24th of January, 1849, executed the following instrument, also endorsed on the first above-mentioned assignment, in the presence of the Government Commissioner or Surveyor of lands, in the Indian Reserve, on the Grand River, viz: "24th of January, 1849, Archibald Green the above assignee, appears before me, David Thorburn, Surveyor of lands, and now assigns all his interest in the premises—viz: the north half of lot No. 2, 1st concession or 4th range, east of Mount Pleasant road, Brantford, for the sum of 37*l*. 10*s*. currency, the payment of which is hereby acknowledged; received from Jeremiah Burtch, who is now assignee of the said premises."

"Drawn in my presence, at Newport, the 24th January, 1849.

(Signed)

his
ARCHIBALD + GREEN, [L.S.]
mark

"Signed, DAVID THORBURN, Surveyor of Lands."

4th. That in May, 1849, the defendant told a witness of the plaintiff, that he had bought a bit of land of the plaintiff, that they had no writings, as each took the other's word, and that he was to pay the plaintiff 37*l*. 10*s*.; that defendant was then in possession, which he said he had received from the plaintiff.

5th. By another witness: that in December, 1849, in conversation between the plaintiff and defendant, the defendant admitted that he had not paid the plaintiff in full for the land, but said he had made some payments on account, some buckwheat and other small things.

For defendant it was objected—1st. That the assignment of plaintiff admits, under seal, the receipt of the purchase money, and estops him.—1 B. & C. 704.

2ndly. If not, that there is no written note or memorandum to charge him, nor any other evidence to support the account stated or any other count.

Leave was reserved to him to move a non-suit, on these grounds ; and it was then left to the jury to say, taking the assignment and parol evidence together, what sum (if any) the plaintiff had satisfied them he had a claim to—the learned judge remarking at the same time upon the absence of any plea of payment, and advising them to decide as if the claim were for the sale of goods instead of land. They found for the plaintiff, 37*l.* 10*s.*

In Michaelmas term, 14 Vict., *Galt*, for defendant, obtained a rule accordingly ; against which *Dr. Connor, Q. C.*, shewed cause the same term, and contended that the plaintiff was entitled to retain his verdict for the price of the land, owing to the defendant's admission of its being due, since the execution of the assignment, even if the instrument of itself would estop him—(*Hallen v. Bunder*, 1 C. & R. 266)—which he denied, not appearing to have been sealed by him, though a seal is attached ; that no estoppel was pleaded, nor was there a plea of payment ; wherefore the defendant should not be allowed to urge either, against the justice of the case ; and that the defendant's subsequent admissions supplied the want of any written note or memorandum to bind him.

Galt, in reply, contended that the assignment shewed conclusively that the defendant was not indebted to the plaintiff as alleged : and, if he was, he was estopped by his own evidence ; and if not, still that there was nothing to supply the want of written proof, nor any sufficient evidence of an account stated, no certain sum being admitted, but the admissions accompanied with a claim of set-off, rendering it doubtful what sum remained due : that the learned judge at Nisi Prius inclined strongly in defendant's favour, which induced him to refrain from giving evidence in support of his set-off.

MACAULAY, C. J.—I feel naturally reluctant to decide against what appears to me the justice of the case ; but I have not been able to satisfy myself that the plaintiff on this

evidence is entitled to recover, although a mere receipt in writing may be controverted as being only *prima facie* evidence.—1 Esp. 173; Straton v. Rastal, 2 T. R. 366; 1 Saund. 325 (c). The cases are clear that a receipt or acknowledgment of payment under seal, estops the party.—Shelly v. Wright, Willes, 9, ib. 25; Straton v. Rastal, 2 T. R. 366; Rowntree v. Jacob, 2 Taunt. 141; Lampon v. Corke, 5 B. & A. 606; S. C. 1 D. & R. 211, ib. 682; Baker v. Dewey, 1 B. & C. 704; 2 Ves. sen., 281, 516; Hosier v. Searls, 2 B. & P. 299; Hill v. The Manchester and Saltford Water Works, 2 B. & Adol. 544; 1 Saund. 325, (c); Lainson v. Tremere, 1 A. & E. 792; S. C., 3 N. & M. 603; Bowman v. Taylor, 2 A. & E. 278; Re Scott et al., 4 N. & M. 264, 267, note; Harding v. Ambler, 3 M. & W. 279; Botherall v. Somers, 2 Y. & J. 407; Beckett v. Bradley, 7 M. & G. 994; note to Flinn v. Callow, 1 M. & G. 589; Pickard v. Sears, 6 A. & E. 469, as to which see Freeman v. Cook, 2 Ex. R. 654, Smith on Contracts (n.)

And although the present assignment does not on the face of it purport to have been sealed and delivered by the defendant, still on the evidence it was a question for the jury: and the fact, although questioned on the argument, was not, that I perceive, disputed at the trial—whether the seal is to be intended to be the defendant's seal, not being so stated on the face of the deed, or proved in evidence. Talbot v. Hodson, 9 Taunt. 251—in this case the bond purported to be sealed and delivered on the face of it; S. C., 2 Mar. 527; Lloyd v. Freshfield et al., 2 C. & P. 325; Clement v. Gunhouse, 5 Esp. 83; Davidson v. Cooper, 11 M. & W. 778; Chanter v. Johnson, 14 M. & W. 409; 16 L. J., Ex. 309; Cooch v. Goodman, 2 Q. B. 580; Hall v. Bainbridge, 12 Jur. 795; Regina v. Inhabitants of St. Paul's Covent Garden, 7 Q. B. 232; 2 Dixon on Deeds, 527.

But, as the defendant has not pleaded payment (a) nor an estoppel (b), he would probably be precluded from

(a) Dicken v. Neale, 1 M. & W. 556; Goodchild v. Pledge, 1 T. & G. 638; S. C., 1 M. & W. 363; Bussey v. Barnett, 9 M. & W. 512; Littlechild v. Banks, 7 Q. B. 739; Barton v. Brown, 5 M. & W. 298.

(b) Freeman v. Cook, 12 Jur. 777; Kieran v. Sandars, 6 A. & E. 515;; Sanderson v. Coleman, 4 M. & G. 209; Magrath v. Hardy, 4 Bing. N. S. 782; 10 A. & E. 447; 1 Saund. 326, (a), (d); Bowman v. Rostron, 2 A. & E. 95.

availing himself of the evidence thereof afforded by the concluding terms of the assignment, had the plaintiff proved a *prima facie* case.

The 1st and 2nd counts appear to me to relate to a contract or sale of an interest in or concerning lands, tenements or hereditaments, within the 4th section of the Statute of Frauds, 29 Car. II. ch. 3—*Curtis v. Flindall*, 3 U. C. R. 323; *Cocking v. Ward*, 1 C. B. 858; 1 P. W. 770; wherefore no action can be sustained thereupon, without proof that the agreement on which the action is brought, or some memorandum or note thereof, was in writing and signed by the defendant or some other person thereunto by him lawfully authorized. The only written proof was the assignment itself, signed, sealed, and delivered by the plaintiff, but not signed by the defendant or his authorized agent. Indeed, it is consistent with the whole evidence, that the defendant was ignorant of its execution at the time, and not aware of it when he made the subsequent admissions relied on as supporting the 3rd count.

All that the assignment shews is, that the plaintiff by an instrument under his hand and seal, executed a contract on his part, which he thereby admits the defendant to have already executed on his part. This neither constitutes proof of the original executory agreement in writing, nor that the defendant was indebted to the plaintiff in the manner and form alleged.—*Eastwood v. Kenyon*, 11 A. & E. 438. Nor do I think the subsequent admissions of the defendant can avail the plaintiff to supply the place of a written contract on the defendant's part, although there is authority to shew that the existence and contents of a written instrument may, under some circumstances, be proved by the oral admissions of the party.—*Slatton v. Pooley*, 6 M. & W. 664; *Taylor's Ev.* P. 294, 486; *Newhall v. Holt*, 6 M. & W. 662; *Cocking v. Ward*, 1 C. B. 866; *Arthur v. Dantch*, 9 Jur. 188; *Hodgson v. Drakeford*, 1 N. R. 270. But in the above cases there had been instruments in writing, in relation to which the subsequent verbal admissions were proved. The objection to the evidence here is, that although the defendant distinctly ad-

mits an agreement for the purchase of the land assigned, he says nothing of any note or memorandum thereof in writing, but on the contrary asserts there was no such thing, and without it the evidence falls short of strict legal proof in support of the two first counts.

The case, then, depends upon the account stated, and one account stated only is laid.—*Kennedy v. Withers*, 3 B. & Ad. 764; *Tyr. Plg.* 275; *Fidgett v. Penny*, 2 Dow, 714; *Knowles v. Mitchell*, 13 East. 250; S. C., 1 C. M. & R. 108; *Howard v. Smith*, 3 Scott N. R. 574; *Simmons v. Wood*, 5 Q. B. 170; *Middleditch v. Ellis*, 2 Ex. R. 623; *Lee v. Moggridge*, 5 Taunt. 36; *Hallen v. Runder*, 1 C. M. & R. 266; *Doe dem. Spencer v. Beckett*, 8 Q. B. 601; *Barber v. Fox*, 2 Saund. 137 (e); *Petch et ux. v. Lyon*, 9 Q. B. 143; *Cocking v. Ward*, 1 C. B. 858; *Cole v. Le Souef*, 3 Scott, 188; 5 Dow. 41; *Tyr. Plg.* 279. In conversation with a witness named Secord, in May, the defendant admitted the purchase, the possession received from the plaintiff, and the price; but whether such price was spoken of only in reference to the original transactions, or what he was to pay by the terms of the agreement, or as a debt still due and which he was still to pay, is not explained. He may have been relating the original bargain, or acknowledging a present subsisting debt which he was to pay. In the latter event, it might perhaps be evidence of an account stated subsequent to the plaintiff's execution of the assignment; but, independent of the objection that such does not appear to have been the import of what he said, the admission was seemingly made only casually to a stranger, not to the plaintiff or any agent of his, and therefore not in itself an accounting or statement sufficient to sustain the action on the account stated.—*Bretton v. Smith*, 1 A. & E. 488; *Jardin v. Payne*, 1 B. & Ad. 168; *Bayne v. Holt*, 8 Jurist, 963; *Finlason's Leading Cases*, 12-13; *Tarbuck v. Bispham*, 2 M. & W. 2; *Bates v. Townley*, 2 Ex. R. 156; *Bishop v. Chambre*, 3 C. & P. 55; 12 Ju. 606; *Curtis v. Flindal*, 3 U. C. R. 323. However, it might have been evidence to go to the jury of a previous accounting then admitted to have taken place, had the de-

fendant unequivocally acknowledged a present debt and liability.—*Lubbock v. Tribe*, 3 M. & W. 612; *Finlason's Leading Cases*, 5, notes; *Irving v. Veitch*, 3 M. & W. 90; *Bloomley v. Grinton et al.*, 1 U. C. C. P. Rep. 309.

The case most resembling the present is *Cocking v. Ward*, 1 C. B. 858; but there, after a verbal contract within the Statute of Frauds executed on the plaintiff's part, it was proved that after such execution on the plaintiff's side, when requested to pay the 50*l.* according to his promise, the defendant admitted his liability and asked for time, saying he would pay it when he got the valuation of his own farm, which it appeared he had since obtained; and this was held sufficient to support the count stated. The facts in evidence in the case before us, do not correspond with those above stated; and the plaintiff, after proving the casual conversation with the witness Secord, went on to prove a subsequent one with another person, in which the defendant, admitting he had not paid the plaintiff in full, claimed to have satisfied him in part, and to be entitled to a set-off to some extent, the amount of which was not proved by either party. This was not only in itself not an account stated, but was calculated to weaken the force of the previous conversation, as an unqualified admission of his being then indebted to the full amount. In strictness, therefore, the plaintiff should be non-suited for defect of proof; but if he can make out a better case at a future trial, either by shewing that the admissions relied on were made to an agent of the plaintiff, or that the admission to the witness Secord was of a continuing debt, and was such that warranted the inference of a previous account stated with the plaintiff, he may have a new trial, but that can only be granted on payment of costs (*a*).

MCLEAN, J., and SULLIVAN, J., concurred.

(*a*) The case of *Curtis v. Flindall*, 3 U. C. Q. B. R. 323, resembles the present, and is much in point.

WHITE v. WYCOTT.

One of two copartners, sued alone for a copartnership debt, is admissible as a witness for the copartner sued, on endorsing his name on the record, under the provincial statute 7 Wm. IV. ch. 3, and by force of the statute 12 Vic. ch. 70.

In this case the defendant went to trial, although a material witness was absent; relying upon the admissibility of a copartner, not sued in this action, as a witness on his behalf. The jury found for the plaintiff 14*l.* in addition to the sum paid into court.

Vankoughnet, Q. C., for defendant, moved for a new trial on two grounds—first, that the witness was admissible; if not, then on affidavit of the absence of the other witness.

Hagarty, Q. C., for the plaintiff, contended that the witness was inadmissible, referring to statute 6 & 7 Vic. ch. 85; *Wilson v. Hirst et al.*, 4 B. A. Dol. 760; *Udal v. Walton*, 9 Jurist; S. C., 14 M. & W. 254; *Sage v. Robinson*, 12 Ju. 1054; *Hill v. Kitching*, 3 C. B. 399; that a release would not have qualified him, owing to an identity of interest in the plaintiff's effects and funds; also that an account rendered by the plaintiff was put in by the defendant to reduce the amount claimed, which thereby became evidence for the plaintiff of the sale as against the defendant; that the verdict was small; and as to the affidavit filed, that the defendant should have moved to put off the trial, and that it shewed no sufficient cause for relief.

Vankoughnet, Q. C., in reply, contended that copartners not joined in an action, are admissible as witnesses under the late act 12 Vic. ch. 70; that placing his name on the record, would be equivalent to a release under the statute, and that the last mentioned act cured all other objections—*Yeomans v. Legh*, 2 M. & W. 419; *Alderson v. Johnson*, 2 M. & W. 71; *Russel v. Blake*, 2 M. & G. 374; 3 Ex. 142; *Sage v. Robinson*, 12 Ju. 1054; that the older cases in which a partner although released was rejected—as 1 Esp. 103; 4 Esp. 112; R. & M. 29; *Peake, N. C. P.*—were overruled by *Wilson v. Hirst*, 4 B. & Adol. 760. He also referred to *Atkinson v. Foster*, 1 C. B. 712; *Hill v. Kitching*,

3 C. B. 299 ; Cupper v. Newark, 2 C. & K. 24 ; Wilcox v. Farrel, 1 House of Lord's Cases, 93 ; 14 Ju. 461 ; King v. Hoare, 13 M. & W. 494 ; Strong, 73.

That after a release, one partner could call on another for contribution, and that the plaintiff had treated the defendant as solely liable ; and that although a *fi. fa.* against defendant would reach only his share of the effects, and the witness might claim a settlement of the partnership accounts before the application of the proceeds to the satisfaction of the execution creditor, still it presented no obstacle ; because, the demand being the subject of the suit, an execution could not be included in the debts of the firm as against the witness ; that there was an equipoise—for if the plaintiff succeeded, the demand would be merged, and if the witness afterwards was sued alone, he could plead the non-joinder of the now defendant in abatement, or the merger in bar ; or if both were sued together, the defendant alone, or both jointly, might plead the former recovery against the defendant, and so defeat the action. That if a judgment was rendered for defendant, he, if sued jointly with the witness, could plead the judgment as an estoppel, and if not sued, the witness could plead his non-joinder ; so, whichever way he stood, the defendant was admissible.—Lech v. Fletcher, 1 C. & M. 625.

MACAULAY, C. J.—The provincial statutes respecting the non-joinder of parties jointly liable when out of the jurisdiction are 59 Geo. III. ch. 25, and 7 Will. IV. ch. 3, secs. 6, 7, ; but it does not appear that the defendant's partner was omitted necessarily by reason of his absence, rather that his joint liability was unknown to the plaintiff. The statute 7 Will. IV. ch. 3, sec. 18, following the imperial statute 3 & 4 Will. IV. ch. 42, enacted, that if any witness should be objected to, on the ground that the verdict or judgment, &c., would be admissible in evidence for or against him, such witness should nevertheless be examined : but in that case a verdict or judgment, in favour or against the party calling him, should not be admissible in evidence for or against him, or for or against any one claiming under him, his name being indorsed in the record under sec. 19.

The cases under the imperial act are *Bowman v. Willis*, 3 Bing. N. S. 669; *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550; *Yeomans v. Legh*, 2 M. & W. 421; 1 Moo. & Rob. 315, 468, 472, 496; *Yardley v. Arnold*, 10 M. & W. 141; *Regina v. Inhabitants of Charlbury*, 3 Q. B. 387; *Faith v. McIntyre*, 7 C. & P. 44; *Russel v. Blake*, 2 M. & G. 374; 3 Scott & R. 574.

The statute 12 Vic. ch. 70, founded on the imperial act 6 & 7 Vic. ch. 85, enacts, among other things, that any person offered as a witness, shall be admitted to give evidence notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or enquiry, or of the suit, action, or proceeding, in which he is offered as a witness; provided that this act shall not render competent any person, in whose immediate or individual behalf any action may be brought or defended, either wholly or in part; so that the question really is, whether the suit is defended in the immediate or individual behalf of the witness, either wholly or in part; for the act is express, that an interest in the matter in question, or in the event of the suit, shall not exclude him. It may be said that it must be intended that the suit is defended in his behalf in fact, being defended by his partner, and being a partnership transaction. The grounds on which it may be implied that the defence is on the behalf of both are, the action relating to a partnership transaction, the interest of both being identical, the assets or funds liable to be diminished or withdrawn, and the witness bound to contribute towards both the verdict and costs, if the defendant should lose, so far as an execution against the defendant solely could affect the partnership effects or funds, it would only extend to his own share; and it is said that the partnership affairs and accounts *inter se* must be adjusted before a vendee of the sheriff could participate, and then only in the surplus.—13 Ju. 1078. Wherefore, the only interest of the witness was to prevent, by favouring the defendant, the probability of his diminishing the joint funds by withdrawing on his own account a sum sufficient to pay the verdict and costs; but

this is a more remote interest than a liability to contribute, as to which the statute prohibits his exclusion.

As respects any liability for costs, the case of *Sage v. Robinson*, 12 Ju. 1054, 3 Ex. R. 142, and *Saiclair v. Saiclair*, 13 M. & W. 640, are applicable under the statute 12 Vic. chap 70; and the endorsement of his name on the record would clearly exempt him under the statute 7 Wm. IV. chap 3, therefrom, in the present case.

As respects *his* interest in the event by reason of his liability to the plaintiff, he stood indifferent so long as his name was not endorsed on the record by the defendant; because if the plaintiff recovered against the defendant and afterwards sued him alone, he might plead the non-joinder of the defendant in abatement, or such recovery in bar, or if sued jointly, both might plead such recovery. The cases on this head are 6 Rep. 45, *Higgins's case*; 2 Saund. 48, d; 1 C. & M. 634; *King et al. v. hoare*, 13 M. & W. 494; *King v. Hoare*, 10 Ju. 1127, as to which see also Ex. parte *Jotman*, 16 Law Times, No. 407, 18th Jan. 1851, V. C. Knight *Bruce*; 10 Ju. 439; 15 L. J. Ex. 298; *Atkinson v. Foster*, *Davies v. Thomson*, 14 M. & W. 161; *Bailey v. Hainer*, 14 Ju. 885; *Bell v. Banks*, 3 M. & G. The effect of endorsing his name at the instance of the defendant, might therefore be prejudicial to his interest, if made a witness for him without his consent, and if it would afterwards prevent the judgment being used for him as against the plaintiff.

The real objection to him was, that he was interested as liable to contribution to the defendant, and the endorsement of his name under the first act would obviate that exception, for it seems to be regarded as equivalent to a release; and if by reason of his name being endorsed on the record, on behalf of the defendant, he would be precluded from availing himself of a judgment in this action in any future suit of the plaintiff, the last statute renders him admissible, notwithstanding his interest in the matter in question or in the event of the suit—consequently the joint effect of both acts would be to obviate all exception of interest in relation to either party.

I do not find that the first imperial act, of 3 & 4 Wm. IV. chap. 42, has received a very clear or critical examination, touching its effects in preventing the record, on which the name of a witness has been endorsed, being used for or against either the witness or the party who called him. Clearly, it shall not be evidence for the party calling against the party called, and *vice versa*, nor in favour of the witness called against the opposite party; but if it would be evidence as an estoppel in favour of the party calling the witness against the opposite party, and yet not be equally evidence for the witness against such party, it might place the witness in a disadvantageous position if compelled to become a witness against his will—as for example, if after a judgment for or against the defendant, in a case like the present, and a subsequent action brought against both jointly, the defendant should refuse to plead the former judgment in bar, and the witness could not.

I infer, however, that the defendant could use a judgment for him as against the plaintiff in any future action, and that the witness, if sued by the defendant for contribution, irrespective of the judgment, might use it against the defendant as precluding resort to the witness, by shewing his name endorsed,—*Russell v. Blake*, 2 M. & G. 374,—This is not the case of a party jointly interested, called by a plaintiff seeking to recover moneys in which he is entitled to participate (*Clark v. Bell*, 12 Ju. 421), but of a copartner resisting a demand.

In *Wilson v. Hirst*, 4 B. & Adol. 760, S. C. 1 N. & M. 742—one who had been a partner with defendant during the period when the transactions had occurred, but who had retired, the plaintiff's accounts having remained unsettled, being called as a witness by defendant, and the two having mutually interchanged releases, was admitted, although it was argued that he came to increase the funds. Lord Denman, C. J., said “We are of opinion that the mutual releases which have been executed by the defendant to the witness, and by the witness to the defendant, made him a competent witness; again, that the releases prevented the witness from having any claim upon the plaintiff's effects,

and also barred the plaintiff from having any claim upon him."—*Jackson v. Galloway*, 8 C. & P. 480.

In *Johnson v. Smith*, 2 C. & K. 808—*Pollock, C. B.*, said, "Whatever any series of releases could effect is effected by the statute 6 & 7 Vic. ch. 85." If so, unless the Lord Chief Baron only means not cross releases, but releases in the same line and interest, the case of *Wilson v. Hirst*, is an authority for the admission of the proposed witness. In this case, reference should however be had to 4 A & E. 550, *Bailiffs of Godmanchester v. Phillips*, where the release to a body corporate, of which the proposed witness was a member, and not personal to the plaintiff, was deemed inadmissible notwithstanding the statute 3 & 4 Wm. IV. c. 42; But the case of *Wilson v. Hirst*, is not mentioned, nor can I say that I perceive any satisfactory distinction. See also *Sage v. Robinson*, 3 Ex. R. 142, in which it seems to be assumed in argument, and even by *Alderson, B.*, in giving judgment, that a partner sued alone, cannot call a copartner, although omitted in the suit, apparently by reason of the necessary intendment that the suit is defended in part in his immediate or individual behalf. It is to be remarked, however, that the present is not a case in which several others, not parties to the action, are equally interested, and who, if liable to contribute, might possibly have some recourse against the witness. It is merely a joint partnership of the two; and were it otherwise, still the ulterior interest would be contingent and remote, and, therefore, according to some of the cases, (1 C. & K. 291,) not a valid objection, and at all events the objection would be removed by the late act.—*Poole v. Palmer*, 9 M. & W. 70; *Beckett v. Wood*, 6 Bing. N. S. 380; *Yardley v. Arnold*, 10 M. & W. 141; *Betts v. Jones*, 9 C. & P. 199; *Jones v. Pritchard*, 2 M. & W. 199; *Aflalo v. Fourdrinier*, 6 Bing. 306; *Doe v. Tyler*, 6 Bing. 393; *Radburn v. Bottomley*, 4 Bing. 649; *Cupper v. Newark*, 2 C. & K. 24; *Russell v. Blake*, 2 M. & G. 374, S. C. 3 Scotts N. R. 574; *Atkinson v. Foster*, 1 C. B. 712; *Hearne v. Turner*, 2 C. B. 535; *Hill v. Kitching*, 3 C. B. 299.

The case of *Ferrie v. Starkweather*, Q. B. U. C. much

resembles the present case, but that was decided long before the passing of either of the late statutes. The proposed witness was out of the jurisdiction, and omitted under the authority of the Joint Obligee Act, and the case was attended with peculiar circumstances. Stress was laid by myself, upon the consideration, among others, that the partner omitted in the action by authority of the statute, stood in a position analogous to one of several joint contractors outlawed in a civil suit, and who could not be received as a witness for his co-contractors, who had appeared to the action (Hardw. 123, 264; Peake's Evidence, 169; Fort v. Oliver, 1 M. & S. 242); and it does not appear to me to govern this case in the present state of the law and the decisions on the subject. It is likewise to be remarked that the test suggested by Parke, B., in Sage v. Robinson, 12 Ju. 1054, whether the party offered as a witness, had such a joint interest as would render his declarations evidence against the defendant, certainly applies against his reception; and if that test was universal, it would determine the point.

On the whole, however, I cannot find any clear ground on which I can now hold the person offered as a witness inadmissible, under the circumstances of this case, which are, that the defendant being one of two partners, is sued alone for a partnership demand, while the other partner was resident within the jurisdiction, and not omitted by reason of his absence, temporary or permanent, but because his connexion with the defendant was unknown to the plaintiff. The defence might originally have been regarded as partly on his behalf, but if his interest in the question or event be superseded or excluded by operation of the statute 7 Wm. IV., ch. 3, as defendant. and 12 Vic. ch. 70, as the plaintiff, I do not see how that can be any longer urged; he could only be made liable through the medium of an action—1 C. & K. 291—and there is no proof of his having interfered in the defence.—See, Hearne v. Turner, 2 C. B. 547; 3 C. B. 308, 311. He may gain contingently, but he cannot directly lose by the result. It is not like the case of an assignee or *cestui que* trust, expecting to reap a benefit

through the medium of assignor or trustees. He was not called to support a co-partner as plaintiff, (1 U. C. C. P. R., *Marmora Foundry Co. v. Murney*,) claiming to receive money for their joint benefit, but to resist a demand made against his partner solely, and towards which, owing to the endorsement of his name, he would not be bound to contribute should the defendant fail in the defence, and as liable to the plaintiff, his interest cannot be objected to since the late statute.

McLEAN, J.—On the trial, the defendant contended that he had received the goods to be sold by him on commission, and that he was therefore not liable to be sued as for goods sold and delivered to him. He called a witness, who in the course of his examination admitted that he was a partner of the defendant in his business, and interested though not sued in the suit. The plaintiff then objected to the testimony of the witness being received, on the ground that he was incompetent to give evidence for his co-partner, on the score of interest. The defendant then proposed to have the name of the witness endorsed on the record, and contended that his name being endorsed so, the record could not be evidence for or against him in any other suit; all doubt of the competency of the witness would then be removed. The learned judge who tried the cause, considered that though the witness might not be liable for any thing in the suit, he must nevertheless have an interest in the assets of the firm, which might be affected by the result, held that the witness was incompetent, and he was rejected.

A verdict was rendered for the plaintiff, against which the defendant now moves, on the ground that the evidence was improperly rejected, and on affidavit. I confess, that when the motion for a new trial was made, I was strongly under the impression that the ruling of the learned judge was perfectly correct, and that the witness must necessarily have so great an interest in the matter, that he could not be competent. On further consideration, however, I am obliged to admit that my impressions on that head were wrong. By the statute 12th Vic. ch. 70, it is enacted that no person shall thereafter, in any suit brought after the passing of that

act, be excluded as a witness by reason of incapacity from crime or *interest*; but that any person offered as a witness may and shall be admitted to give evidence on oath, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of the suit, action or proceeding in which he is offered as a witness, provided, that the act shall not render competent any party to a suit who is individually named on the record, or *any person in whose immediate or individual behalf any action may be brought or defended either wholly or in part*, or the husband or wife of such person respectively. On the score of interest, the witness could not be excluded, *unless the suit has been defended in his immediate or individual behalf, either wholly or in part*. It cannot be said to have been defended wholly in behalf of the witness, by his co-partner the defendant. Wycott was defending for himself, in his own name, and if he lost the suit he could only call on his co-partner for contribution from the partnership funds to meet the demand. The witness had an interest in preserving these funds, which might be supposed to influence his testimony; but a release from the defendant of all claim for contribution would have removed the objection of interest, and made him a competent witness even before the passing of the act 12th Vic., ch. 70; and the endorsement of his name on the record would have been sufficient under the 7th Wm. IV., ch. 3, if, in order to recover against the witness offered, it would be necessary for the present defendant to use that record in any subsequent proceeding. So far as any claim of the plaintiff could be urged, the witness was competent. He could not be sued by the plaintiff for the amount in any other action, because he could plead in abatement the non-joinder of the other defendant; and, if both were sued, they could plead the result of a former suit for the same cause of action against one of them. If the plaintiff recovered against the defendant in this suit, he could only proceed against the goods of the defendant alone for the amount.—King et al. v. Hoare, 13 M. & W. 494. The co-partner's interest in the goods could not be seized or disposed of; so that there could be no

liability, unless for contribution to the defendant. Then, if the witness's name had been endorsed on the record, could the defendant have called upon him notwithstanding for contribution? He could not call on him as partner, in a court of law, till after a settlement of the partnership affairs; and if he proceeded in Chancery, and introduced the amount of plaintiff's claim as an item of his account, the party who had been used as a witness could shew that his name had been endorsed on the record on account of interest, and that he had by such endorsement been released from such interest, and thereby rendered competent as a witness. If this action had been upon a promissory note made by the defendants, jointly, or jointly and severally, instead of being on the common counts, and the defendant had been sued alone, he would be entitled to call the other maker of the note as a witness on the trial, to support a plea of payment, or any other defence which would enable him to defeat the plaintiff's recovery. The cases of *Russell et al. v. Blake*, 2 M. & G. 374, and *Wilson et al. v. Hirst et al.*, 1 N. & M. 742, especially the former, are strong on that point. In that case, Tindall, C. J., in delivering the judgment of the court, says, "If the plaintiff obtain judgment in this action, the debt upon the note will become a judgment debt from the defendant to the plaintiff; and if the defendant afterwards pay this judgment debt, he cannot maintain an action for contribution against the witness, without resorting to the judgment, which judgment, by the provisions of the statute, cannot be given in evidence against the witness. And although it has been argued that the defendant might in that case maintain his action against the witness for contribution, simply by producing in evidence the note, and proving the act of payment: yet such does not appear to be the case; for it would, in effect, be to present to the court a cause of action which is not founded in truth and reality—the right to contribution being in truth founded on a payment made in satisfaction of a judgment, not on the payment of a debt due upon a promissory note; and the defendant would have it in his power to defeat it, by requiring a bill of particulars of the debt on which the payment was

made ; and in case of payment of the note being relied on as the foundation of the suit, by giving the judgment in evidence, which he would be entitled to do under the statute, when the verdict had been *against the party* on whose behalf he was examined. And as to the cost of the original action, supposing that any could be demanded, it is clear they could not be recovered without producing the judgment itself." Now, a co-partner is not precisely in the same position as a joint maker of a note, inasmuch as an action at law cannot be maintained by one co-partner against the other for contribution ; and any claim of that nature can only be settled in Chancery : and such claim may be defeated by shewing either a release or the endorsement of the name as a witness in the original suit on the record, which would operate as a release. If, then, a joint maker of a promissory note, or a joint owner of a ship, are competent witness by the endorsement of their names on the record when they are not sued, I cannot see on what principle a partner in business can be rejected under the same circumstances. A joint or several maker of a note, or a joint owner of a ship, is equally liable for contribution to the parties with whom they are interested ; but they are held to be competent witnesses for such parties, by being released, or having their names endorsed on the record. I am unable, in this case, to discover any sufficient reason to prevent the witness from being examined ; and, as it is impossible to tell what effect his testimony might have had on the result of the case, I think a new trial should be granted, without costs.

SULLIVAN, J.—I ruled at the trial of this cause, that a partner of the defendant not sued in the action, who disclosed upon his evidence, that he was concerned in the business in which the cause of action arose, was not a good witness for the defendant, and I refused to endorse his name upon the record.

Upon considering the authorities, though the point does not seem to be directly settled, the best opinion I can now form is that the cases are against my decision at *Nisi Prius*, and that I should have endorsed the witness's name on the

record; and then, whatever ground there might have been for deciding that the action before was defended in part on his behalf, the endorsement of his name would have deprived him of all interest in the defence, and the action would no longer have been defended in his behalf, wholly or in part.

Lord Denman's act was not intended to narrow the limits within which witnesses were to be competent; and if a case can be shewn in which the interest of a witness ceases by means of releases or endorsement, the witness does not seem to be excluded because the action was at one time defended partly for his benefit, and because the successful defence would have been beneficial to him.

Hearne v. Turner, 2 C. B. 547, is an instance in which the court were of opinion, that under the joint operation of the statute of Wm. IV. and of Lord Denman's act, a witness might become competent; and it would follow, that if all objections on the ground of interest were removed from the testimony of this witness, the question would become unimportant whether he fell within the proviso in the statute of 12 Vic., or not.

In Young v. Bairner, reported in 1 Esp. N. P. C. 103, Lord Kenyon in banc overruled his own *Nisi Prius* decision against the competency of a joint ship owner, as witness for the defendant, his co-owner of the ship, in a suit for the amount of repairs done to the joint property. It was urged in that case, in favour of the competency of the witness, that the testimony he was to give would charge himself solely; but that, according to the opinions of the present day, would not lessen the objection. In Hawkesworth v. Showler, 12 M. & W. 44, the court all agree that the doctrine is exploded that a witness is competent to prove one thing for the party calling him, but not another. The true ground for the decision is, that by the release offered, he became indifferent between the parties to the suit; and as that case, so far from being overruled, is still cited as a leading authority, I acknowledge that I can see no satisfactory distinction between it and the one now under consideration. Jones v. Pritchard, 2 M. & W. 199, was an action of the same kind, and a part owner of a ship was

admitted as a witness to exonerate the defendant, another part owner; in this case *Cheyne v. Koops*, 4 Esp. 112, is spoken of as overruled, and *Yound v. Bairner* as clear authority. *Wilson v. Hirst*, 4 B. & Ad. 760, is also cited as strongly in point; and so it is, for although the witness had ceased to be a partner of the defendant's, he was clearly interested in the balance to be struck between the plaintiff and defendant. *Simons v. Smith*, Ry. & M. 29, and *Cheyne v. Koops*, were cited in *Jones v. Pritchard*, but do not appear to have weighed with the court; though, in the former of these cases, Lord Tenterden had decided that a release would not make a partner a competent witness, for the defendant his co-partner.

The case of *Russel v. Blake*, 2 M. & G. 374, decides that a joint maker of a promissory note is a good witness for the defendant, another joint maker, under the statute of Wm. IV., his name being endorsed in the record. In *Poole v. Palmer*, 9 M. & W. 70, the court on the authority of *Russell v. Blake*, held that a joint contractor was a competent witness for the defendant, his co-contractor; Lord Abinger overruling his own *Nisi Prius* decision. It seems to have been held in this case, that the judgment in favour of or against one joint contractor, would not be a bar to an action against another joint contractor for the same cause; which doctrine is not afterwards held sound.—See *King v. Hoare*, 13 M. & W. 494. But the decision in *Poole v. Palmer* does not depend upon this point. *Atkinson v. Foster*, 1 Q. B. 702, is much in favour of the admissibility of the witness, under the act Wm. IV. In *Dresser v. Clarke*, 1 C. & K. 569, a defendant who allowed judgment to go by default, was admitted as a witness for the plaintiff against a co-defendant, on the principal that he was no longer a party named on the record. The same point was decided in *Pipe v. Steele*, 2 Q. B. 733. These cases are upon the construction of Lord Denman's act. *Hill v. Kitching*, 2 C. & K. 278, S. C. 3 C. B. 302, and *Johnson v. Graham*, 2 C. & K. 807, are upon the same statute, and are in favour of the admissibility of the witness; and the latter case is remarkable for the expression of Pollock, C. B.: "In my opinion, what-

ever any series of releases could effect, is effected by that statute" (Lord Denman's act). After all these cases, I felt disappointed in seeing that in *Sage v. Robinson*, 3 Ex. 142, the counsel and some of the court thought it necessary to draw a distinction between the witness in that case and a partner of the defendant; which would go far to shew that, according to the impression on the mind of the counsel on both sides, and of the court, a partner would not be a competent witness.

In what way the question will be finally set at rest, I am unable to prognosticate; but it seems to me that the weight of authority is in favor of the competency of the witness, who being a partner, is saved from his liability to contribute, either by a release from his co-partner the defendant, or by means of the indorsement of his name on the record. These releases and endorsements we know in practice to be mere forms. As regards persons who rely upon private understandings between themselves, contrary to the releases or endorsements publicly made, in most cases the witness is more interested in preserving a good understanding with his partner than in escaping from particular liabilities, when the escape is contrary to honor and good faith; and I think that it is to be regretted, that when the courts and the parliament have gone so far in admitting testimony, that parliament should have hesitated in admitting the parties to legal proceedings themselves as witnesses.

I am now of opinion that the weight of authority is in favor of the competency of the witness whose testimony was tendered at the assizes; and although his evidence, as it was disclosed, would have made but little difference in the result of the case, still, such as it was, the defendant was entitled to have it submitted to the jury. I therefore concur in the opinion of the rest of the court.

Rule absolute for new trial, without costs.

MARCH V. BURNS.

Pleading in abatement—Certainty.

A plea in abatement of another action pending, which alleged that before the issuing of the writ in the action pleaded to, or before the plaintiff's declaring therein, he issued the writ in the action alleged to be pending, held bad for not shewing with sufficient certainty that the action alleged to be pending, had been commenced when the writ in the action pleaded to was sued out.

A plea in abatement of another action pending ought to pray judgment, both of the writ and declaration, and where such a plea in its commencement, prayed judgment of the writ only, and in its conclusion both of the writ and declaration, it was held bad for inconsistency.

Although a plea in abatement need not be demurred to specially, yet, all objections intended to be urged, must be noted on the margin of the demurrer book pursuant to the rule of the court.

Writ of summons issued 8th November, 1850.

Declaration dated 7th December, 1850. Assumpsit on the common counts; goods sold and delivered; work and materials; money had and received; and an account stated.

Plea: Defendant prays judgment of the said writ, because before the issuing of the writ in this cause, or the plaintiff's declaring thereupon—to wit on the 19th September 1850—the plaintiff issued a writ of summons out of this court against the defendant, whereby he was commanded within eight days after the service thereof, to cause an appearance to be entered in the said court, in an action on promises at the plaintiff's suit, and that the parties in this and the former suit are identical, and that the said writ so issued on the 19th of September, 1850, was issued by the plaintiff, for and in respect of the breach of the very same identical promises in the said declaration in this present suit, and now pleaded to, mentioned, and that the plaintiff after the said writ had so issued on the 19th September, as aforesaid, and whilst the same suit was depending—to wit, on the 8th November in the year aforesaid—issued a certain other writ of summons against the defendant, and whereby he was commanded within eight days after the service of that writ he should cause an appearance to be entered in this court in an action on promises, at the suit of the plaintiff; and defendant duly caused an appearance to be entered for him in the said court to the said last mentioned writ, in obedience to the summons aforesaid, and thereupon the plaintiff declared therein, and upon the identical premises,

aforesaid, and that the said former writ and action so issued and procured against him by the plaintiff as aforesaid, is still depending in the said court; and this he is ready to certify; wherefore he prays judgment of the said writ, and the declaration thereon founded now pleaded to, and that the same may be quashed.

Demurrer—special causes assigned.—1st. Uncertainty whether the writ in the other suit mentioned, issued before the commencement of this suit, it being only alleged that it issued before the writ in this action, or the plaintiff's declaring thereon, making it uncertain which.

2nd. Inconsistent, in first praying judgment of the writ, and then concluding with a prayer of judgment of the writ and declaration.

Strong, in support of the demurrer, contended that the plea being in abatement, should be certain to every intent (1 Chit. Pldg. 257, 473), and that it was uncertain on the grounds of demurrers assigned; he also claimed to be entitled to urge new grounds of special demurrer, though not assigned, (*Esdale v. Lund*, 12 M. & W. 607; and *Loyd v. Williams*, 2 M. & S. 484), and objected that there was duplicity in setting out two other writs besides the one in this action, issued respectively on the 19th of September, and 8th of November, neither of which are alleged to be identical with that declared on, nor is it alleged which is the one still pending, which is pleaded in abatement; also, that the plea in its commencement should have prayed judgment in the declaration, as well as of the writ, whereas the declaration continues the objection to the writ. *Davies v. Thompson*, 14 M. & W. 161; 3 D. & L. 49, S. C.—Praying judgment of the declaration alone is bad. Judgment should be prayed of the writ. *Gray v. Pindar*, 2 B. & P. 427—Introduction and body of plea inconsistent and bad.

Duggan, for defendant, referred to forms in 3 Chit's Pleadings 19, in which the plea alleges the issue of the first writ, before the writ in the action or the plaintiff's declaring thereon; that *or* is a disjunctive particle and equivalent or corresponds to *either*, and not alternative as if the word *either* fol-

lowed *before*. This form is in a note said to be approved in *Abbott v. Raphail*, June, 1835.

That additional causes cannot be raised, at all events without their being noted in the demurrer books: that as to the commencement of the plea praying judgment only of the writ, the prayer for judgment governs.—*Powell v. Fullerton et al.*, 2 B. & P. 420; *Rex v. Shakespeare*, 10 East. 87; *Attwood v. Davis*, 1 B. & A. 172; 2 Saund. 210 b. c.; 1 Chitty's Pleadings, 476.

Strong, in reply stated that the form in Chitty, jr., 214, was not as stated: and as to the word *either*, if it preceded instead of following the word "*before*" it has a force different from that ascribed to it by the defendant's counsel, if placed after it; which proves the uncertainty of the word *or*, as used, and that either reading shewed the uncertainty.

MACAULAY, C. J.—In one edition of Chitty's Pleadings, the word *and* appears instead of *or*, so the precedents are not uniform; later forms say, in terms "*before the commencement of this suit.*"

The plea throughout follows closely the form in Chitty, mentioned by the counsel for the defendant, except that in the commencement the former prays judgment of the writ and declaration; but that precedent was before the late rules and altered mode of declaring.

At present, the writ is the commencement of the suit, and the date of its issue is required to be stated in the introductory part of the declaration; consequently neither the fact of its issue, nor the time thereof, are required to be stated in the plea which in the beginning refers thereto.

There is room for the objection of uncertainty in the use of the word *or* in the beginning of the plea, though coupling it with the date of the issue of the prior writ immediately afterwards.

I am not satisfied the defendant ought not to be understood as meaning to state the issue of the writ of the 19th of September, 1850, before the issue of the writ in this suit, and also before the plaintiff had declared thereon. *Ryalls v. Bramall*, 1 Ex. R. 734, and in *Cleal v. Elliott et al.*, 1 U.

C. C. P. R., as to the intendment of time alleged in pleading. The plea, however, appears to me objectionable in two other respects. It may have been unnecessary to have prayed any judgment in the commencement of the plea, and sufficient to have done so at the conclusion thereof, but the plaintiff having done both should have done so correctly. The prayer at the conclusion is the proper one, the writ is the commencement of the suit, and the declaration an exemplification of the writ. Wherefore quashing the writ only, as prayed in the outset, would leave the declaration untouched; and if it stood alone, the cases of *Owen v. Walters*, 2 M. & W. 91, S. C. 3 D. & L., *Shepherd v. Shepherd*, 1 C. B. 849, 14 L. J. C. P. 230, 2 Dow. P. C. 584, shew that the court would not look out of the declaration; so quashing only the declaration would leave the writ untouched, and the plaintiff might declare again.

The case of *Davies v. Thompson*, 14 M. & W. 161. decides that judgment should now be prayed both of the writ and declaration; and all the late forms are so. The new rules have made no difference, it is said, as respects the formal parts of pleas in abatement.—*Bleakley v. Kay*, 13 M. & W. 464; *Hardw.* 345; *Fort.* 335; *Davis v. Spence*, 5 Mod. 144; *Com. Dig.* Abatement 12; *Mainwaring v. Newman*, 2 B. & P. 124 c., 420, 427; *Herries v. Jamieson*, 5 T. R. 553; 1 Saund. 284 (4); 2 Saund. 209 (1); *Archbold's Pleadings and Evidence*, 304; *Stephens' Pleading*, 54, 445, 447; *Chitty's jr. Forms*, 17, 197 and notes; 1 Ex. R. 734; 18 L. J. Ex. 26.

But what appears to me to vitiate the plea, is the uncertainty created by the statement in the body of it, of the issue of another writ on the 8th of November, without averring it to be the same writ mentioned in the beginning of the declaration and alluded to at the head of the plea.

It might have formerly been necessary to state when the writ issued in the action pleaded to, in order to shew that the suit pleaded in abatement had been previously commenced; but even then the identity of the writ so mentioned, and that prayed to be quashed, should be distinctly averred. At present there is no necessity for stating the time of its issue, for it already appears on the face of the

declaration, and stating it as done in the present plea, only occasions uncertainty as to what, pending the suit, is intended to be pleaded in abatement of this one; and, as said by Pollock, Q. B., in *Bleakley v. Jay*, 13 M. & W. 414. "We are not to discuss these nice points upon a plea in abatement; it must be good *in omnibus*" (a). On the whole, therefore, it appears to me that judgment should be against the plea. I will only add, that although it seems to be understood that it is not necessary to demur specially to pleas in abatement, but that objections of form may be raised on general demurrer, still I find nothing to dispense with the necessity of any objections intended to be urged, being noted in the demurrer books, according to the new rules.—H. T. 13 Vic. No. 27, p. 9.

McLEAN, J., and SULLIVAN, J., concurred.

SWITZER V. BALLINGER.

1st count:—Trover for two horses and two mares.

2nd count states, that before and at the time when, &c., plaintiff was possessed of horses and mares of like number, which were let to hire to one A. for a term unexpired, and that defendant, wrongfully intending to injure plaintiff, seized and took the same and converted and disposed thereof to his own use, &c. 4th plea to 1st count.—The issue of a warrant against the goods of A. at the suit of B., directed to defendant as constable, commanding him to attach, seize, &c., the goods and chattels of A. and that said goods and chattels in the first count mentioned were the goods and chattels of A., and that plaintiff claimed title thereto under color of a conveyance thereof made by A. to him, for a pretended consideration, to the intent, &c., and that defendant, as such constable, did seize and take he said goods and chattels, which is the supposed conversion. 5th plea to 2nd count. That defendant, as such constable, under and by virtue of said warrant, did seize and take, &c., the said goods and chattels, being the goods and chattels of A., as by the said warrant he was commanded to do, being the said supposed conversion in the second count mentioned.

Held, that the 4th plea was bad, as amounting to an argumentative denial that plaintiff was possessed as of his own property; and that the 5th plea was also bad, as amounting to the general issue, and also on the ground that it does not confess, avoid or justify, any injury to the plaintiff's reversion.

Declaration dated 21st December, 1850.

1st count:—Trover for two horses and two mares—day laid the 1st January, 1850. 2nd count states, that before and at the time of committing the grievances afterwards mentioned, the plaintiff was owner of horses and mares of like number, &c. as in 1st count mentioned, and which

(a) See *Salmon v. Mathews*, 8 M. & W. 223; *Ashton v. Brevitt*, 14 M. & W. 106; *Stead v. Poyer*, 1 C. B. 783.

had been before then, let to hire to Thomas Totten for a certain term then to come and unexpired, and that the same were in the possession of the said Totten under the said letting; yet defendant, well knowing, &c., and wrongfully intending, &c., to injure plaintiff in his reversionary interest and property, and said horses and mares, &c., while plaintiff was owner thereof, and while the same were let to and in the possession of said Totten as aforesaid—to wit, on the 1st of May, 1850—wrongfully seized and took the said horses and mares of plaintiff from and out of the possession of the said Totten, and converted, detained, and absolutely sold and disposed thereof to his own use, &c., whereby plaintiff was injured, &c., in his reversionary estate and interest therein, &c.

4th plea to 1st count:—That before and at the time of the pretended and fraudulent conveyance afterwards mentioned, and before the time when, &c., in 1st count mentioned, Thomas Totten was indebted to William Robinson in less than 10*l.*—to wit, 7*l.* 10*s.* 0*d.*—for debt upon a contract made in the Home District, between them; and said Robinson, before the said time when, &c., and after the 30th May, 1849, having made an affidavit of debt to the amount of 7*l.* 10*s.* 0*d.*, &c., and that said Totten was about leaving the said Home District, taking personal estate liable to seizure under execution for debt, &c., caused Benjamin Switzer, a justice of the peace, before whom the said affidavit was made, to issue his warrant to defendant, then being a constable of the said district, commanding him to attach, &c., all the personal estate and effects of said Totten, &c., and that the said goods and chattels in the 1st count mentioned, before and at the said time when, &c., were the goods, chattels and property of said Totten, and that plaintiff claimed title thereto under color of a certain conveyance thereof, made by said Totten to him for a pretended consideration, to the end, purpose, and intent to hinder and defraud the said Robinson as being a creditor of the said Totten, of his debt aforesaid, contrary to the statute, &c., by virtue of which warrant said defendant, as such constable as aforesaid, afterwards in the said Home

District, at said time when, &c., did seize and take the said goods and chattels in the said 1st count mentioned, being the goods, &c., of said Totten as aforesaid, for the purpose of attaching the same under the said warrant as was lawful, and being the said supposed conversion, &c.

5th plea to 2nd count states the debt, affidavit, issue of warrant, and its delivery to defendant, as in last plea; and then states that by virtue of such warrant, defendant as such constable did afterwards, within the Home District, forthwith and while the interest of said Totten in the said goods and chattels was still continuing, and the term to him thereof granted by plaintiff unexpired—to wit, at the said time when, &c.,—seize and take the said goods and chattels in the said 2nd count mentioned, being the goods, chattels, and property of said Totten as aforesaid, for the purpose of attaching, seizing, and safely keeping the same, as by the said warrant he was commanded, as was lawful, &c., being the said supposed conversion in the said 2nd count mentioned, &c.

Demurrer—special cause as to 4th plea.

1st. That it is argumentative in this, that it argumentatively denies that the goods, &c., in first count mentioned, were the goods of plaintiff, by alleging that they were the goods, &c., of Totten.

2nd. That although it concludes with a verification, and sets up title in Totten, it does not confess any colourable right or title in plaintiff.

3rd. That it should have concluded to the country, and not with a verification.

Special causes to 5th plea.

1st. That it assumes to answer the whole of the second count, but only answers a part thereof—namely, the seizure and taking therein mentioned, leaving unanswered so much thereof as relates to the selling and disposing of said goods, and converting the same to the defendant's use.

The defendant joined in demurrer.

Strong for demurrer :

That the 4th plea does not give color, a sale without possession not being sufficient.—*Harrison v. Dixon*, 12 M. & W. 142.

That the conversion is not answered by the plea that the debtor was a mere bailee for hire, with no seizable interest, and that therefore the act of seizure was an injury to the plaintiff; that the justification to the second count only relates to seizing as the conversion complained of, not the actual conversion by sale, if that is meant by the plaintiff.—2 Chitty's Pldgs. 583; Weeding v. Aldrich, 9 A. & E. 861; Owen v. Legh et al., 3 B. & A. 470; Jackson v. Pesked, 1 M. & S. 236.

That the plea merely justifies seizing the debtor's interest, not the plaintiff's reversion, and therefore bad.

Cameron, Q. C., objected to the 2nd count of the declaration, that no damage arises to the reversion by the sale of goods in which the plaintiff has only a reversionary interest.—*Morrison v. Carrall*, in this court, and *Henderson v. Moodie*, 3 U. C. R. Q. B. 348; Chitty's Forms, 611; 1 A. & E. 372.

That this count does not shew any conversion of the plaintiff's reversion, which is only laid as consequential upon the seizing or aggravation.—See 9 A. & E. 862.

That the 4th plea does give color—a conveyance of goods constructively importing possession.

MACAULAY, C. J.—1st. As to the second count of the declaration, I think it sufficient on general demurrer, according to our decision in *Morrison v. Carrall* in this court. It states that the defendant wrongfully seized and took the goods from and out of the possession of Totten, and converted, detained, and absolutely sold and disposed thereof to his own use.—*Farrar v. Beswick*, 1 M. & W. 685; *Ashton v. Brevitt*, 14 M. & W. 106. If so, I think the plaintiff was injured in his reversionary interest therein.—*Scott v. Scholey*, 8 East. 477.

3rd. As to the 4th plea—It was at first considered, that under the new rules, the defence that the plaintiff claimed property under a sale fraudulent and void, in *toto*, or as against creditors, required to be specially pleaded, as the consequence of the rule H. T. 4 Wm. IV. No. 4, that in actions on the case, the plea of not guilty should operate as a denial only of the breach of duty or wrongful act alleged, &c., *ex. gr.* in trover the conversion only, and not the

plaintiff's title to the goods ; and that all matters in confession and avoidance should be pleaded specially, as in actions of assumpsit, as to which, this rule is that all such matters, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, should be specially pleaded—Woodhouse v. Swift, 7 C. & P. 310 ; Ashmore v. Hardy, *Ib.* 501 ; Howell v. White, 1 Moo. & Rob. ; Carter v. Johnson, 2 Moo. & Rob. 263, 2 C. M. & R. 659, 1 Gale, 295, Nicolls v. Bustard, 1 T. & G. 159, Farrer v. Beswick, 1 M. & W. 682, Morratt v. Sign, 2 M. & W. 95 ; *Ib.* 191 & 395 ; Samuel v. Duke, 3 M. & W. 622 ; *Ib.* Lewis v. Alcock, 188—as to which see Ashby v. Minnitt, 8 A. & E. 121, Cro. El. 485, 10 Co. 88 ; Fancourt v Bull 1 Bing. N. S. 681 ; Acranan v. Cooper, 10 M. & W. 585 ; Ashton v. Brevett, 14 M. & W. 166 ; Unwin v. St. Quintin, 11 M. & W. 277 ; Mason v. Farnell, 12 M. & W. 683 ; 12 A. & E. 114 ; Whitmore v. Green, 13 M. & W. 107 ; 12 Jurist, 580 ; Kynaston v. Crouch, 14 M. & W. 266 ; Midgley v. Richardson, *Ib.* 603 : Chitty Jrs. Forms, 699, 772 and notes. But in the case of Howarth v. Tollemache, 4 M. & G. 427, a similar plea was held bad, as being an argumentative denial that the plaintiff was possessed as of his own property.—Leake v. Loveday, *Ib.* 972 ; Wilkinson v. Whalley, 5 M. & G. 590. and such special matter was given in evidence, under the plea of not possessed, in Load v. Green, 15 M. & W. 216 ; Bradley v. Copley, 1 C. B. 685 ; Harrison v. Dixon, 12 M. & W. 142 ; see Purnell v. Young 3 M. & W. 288, and Marshall v. Lamb, 5 Q. B. 126, overruled by Jones v. Chapman, 2 Ex. R. 803 ; Taylor's Ev. 223, 226, 227 ; Doe d. Gord v. Needs, 2 M. & W. 139 ; White v. Spettigue, 13 M. & W. 603 ; Dorrington v. Carter, 1 Ex. R. 506 ; Bingham v. Clements, 12 Ju. 580.

The plea of not possessed is considered to be a special traverse within the meaning of the new rules, in Jones v. Chapman, 2 Ex. R. 803. I think, therefore, we must hold this plea bad, as amounting to the plea of not possessed ; or in other words, that the title or right of property should have been thus specially traversed.

3rd. As to the 5th plea, it seems to me bad on the authority of *Dorrington v. Carter*, 7 Ex. R. 566, as amounting to the general issue.—*Acranan v. Cooper*, 10 M. & W. 585.

It is pleaded in confession and avoidance to the whole count, including a conversion to the injury of the plaintiff's reversionary interest, and yet does not in the matter of it, admit any such conversion, but, on the contrary, it admits the plaintiff's title, and treats the mere seizing and taking the goods for the purpose of attaching, seizing, taking, and safely keeping them as the qualified property of Totten, &c., as the conversion complained of, and treats the selling and disposing thereof, &c.—in other words, the actual conversion of which plaintiff complains—as mere aggravation. If the defendant did no more than seize the goods, so far as respected Totten's property and interest therein, he did not thereby commit any actionable injury to the plaintiff's reversion; and on the plea of not guilty, mere proof of such a seizure would not sustain the plaintiff's case.—See *Henderson v. Moodie*, 3 U. C. Q. B. 348, and *Morrison v. Carrall*, in this court, and cases therein cited; See also *Higgins v. Thomas*, 8 Q. B. 908, which seems to me quite in point.—*Acranan v. Cooper*, 10 M. & W. 585. *Samuel v. Duke*, 3 M. & W. 622, may make it questionable whether a plea like the present should not be pleaded to the first count, but is against the necessity for it to the second; this case distinguishes between a conversion complained of in the seizure, and in the subsequent sale of goods. *Vernon v. Shipton*, 2 M. & W. 9—as to which see 12 Jurist, 580; *Pratt v. Pratt*, 2 Ex R. 413; *Foulder v. Willoughby*, 8 M. & W. 540. *Woods v. Durrant*, 16 M. & W. 149, does not seem to me inconsistent with this view. In actions of trespass an alleged conversion is mere aggravation, but here the alleged sale and conversion are the gist of the case, for without them, no injury to the plaintiff's reversion would appear. The plea does not confess and avoid, or justify any act that constituted an injury to plaintiff's reversion, and seems to me therefore insufficient.

Judgment for the demurrer.

McLEAN, J., and SULLIVAN, J., concurred.

Note.—During the reading of the judgment in this case *Cameron*, Q. C., submitted that it was not assigned as ground of special demurrer that the plea

ANDERSON, ADMINISTRATRIX, V. ANDERSON ET AL.

Where a case has been left to the jury on the facts, the court will not disturb their verdict.

Semble, that affidavits of persons who might have been called as witnesses on the trial of the cause are inadmissible, and will not be allowed on taxation of costs.

Writ issued 23rd August, 1850.

Declaration dated 10th September, 1850.

1st count:—Trover for straw, wheat, mares, geldings, colts, sheep, and a heifer, the property of the intestate, laying the conversion after his death, and in the time of the plaintiff, to wit, on the 29th July, 1850,—Administration granted 15th August, 1850.

2nd count: The same as the first, laying the conversion on the 15th of August, after the grant of administration, of which *profert* of the letters is made.

Pleas, jointly:—

1st, Not guilty.

2nd, That testator was not possessed &c., as of his own goods, &c., and issue.

The case was laid before Mr. Justice Sullivan, at the autumn assizes, 1850, held in and for the County of Hastings, when it appeared in evidence, that the defendant John was a brother, and the defendant Alexander, an uncle of the intestate; that the intestate had lived on No. 31, 9th concession of Thurlow, where he carried on merchandize; and that he died on the 16th July, 1850; also, that he had a farm, being No. 19, in the 1st concession of Huntington, near where he lived; that he was possessed thereof, and put in crops in the summer of 1850, of wheat 13 or 14 acres, oats, potatoes, buckwheat, and peas; but no one lived on the said lot in Huntington; also, that he possessed a mare,

amounted to not possessed; that the point had not been argued, and should not be noticed by the court, being only ground of special demurrer. MACAULAY, C. J., said, the first ground as assigned, involved the second point in question; the ground assigned is, that the 4th plea was argumentative, by argumentatively denying that the goods were the goods of plaintiff. It is certainly somewhat weakened by what follows in explanation of the plaintiff's meaning—namely, by alleging that they were the goods of Totten; but still the substance is the same—it is an indirect instead of a direct special traverse of the plaintiff's title and property. A direct special traverse would be, not possessed—the affirmative matter pleaded, is a roundabout way of virtually asserting the same thing. The 5th plea is bad as amounting to the general issue, and also on the ground assigned, *i.e.*, assuming to answer the whole count, and yet not doing so, because it does not confess any injury to the reversion, and avoid or justify it.

which he used as his own ; also two colts, one bought of one Glass, and the other from the mare ; both in pasture on said lot 19, when he died by drowning ; that defendants lived together on No. 18, in Huntington, and harvested the above wheat, and placed it in their barn on No. 18, after the death of the intestate. The mare was also seen on lot No. 18, and she was seen drawing defendant's waggon, and defendant John said he had used her one day after intestate's death. The colts were also seen in a pasture field of lot No. 18, after his death. It was said the lots 18 & 19 were formerly one farm, but that since the intestate had married and removed, he had occupied No. 19 almost exclusively. There was, however, evidence that, in addition to, and independently of the fields of grain sown by the intestate, the defendants, or one of them, had grain on another part of No. 19.

A demand was made in the plaintiff's behalf, as administratrix, upon the defendants, for the wheat cut off two fields, one of 12 and the other of 2 acres, put in by the intestate, assisted by the defendant Alexander, who said he was working for the intestate. The mare and colts, and other property, such as oats, buckwheat, &c., were not claimed in this action. In reply to such demand, the defendant Alexander said the wheat was a light crop, worth little, and that he meant to apply it to a bank debt, apparently a debt of intestate, for which he was liable ; and that the mare and colts were his own ; also, that defendants said the property was not sufficient to pay intestate's liabilities to them. The defendants's counsel objected that no conversion was shewn, or that a sufficient conversion was not shewn, because the intestate and defendants were joint tenants, and no distinction *proved* ; that no property in him or plaintiff was shewn, nor a sufficient demand and refusal.—The objections were overruled.

To meet the plaintiff's case, the defendants gave evidence that the father of the defendant John had died after the plaintiff's intestate ; that the intestate, about the first of March, 1850, in view of the field of wheat on No. 19, had said he had done the greater part of the work, being

handy to his house—but that “we all work together, and all work through each other,” meaning the defendants and himself; also, that he said the grain raised, was to go towards paying off some debts that were then against them, his words being “*against us*,” and that after the debts were paid some other arrangements might be made; that the father of the intestate and defendant John worked the whole of 18 and 19 with the young men and the defendant Alexander; and that before the intestate removed to keep a store, things were in common. At least, the defendant’s first witness stated that the intestate had so told him, but he had not seen them working. The mother of the intestate and defendant John said, her husband, sons, and defendant Alexander worked the farm together, consisting of lots Nos. 18 and 19; that when the sons were minors, the loose property belonged to their uncle and their father, and was never divided; that the mare was one of the old stock on the farm, and the colts raised there, not being owned by one more than another, and remained on the farm; that the intestate was married in July, 1848; and that the family built him a house in Thurlow, to which he and his wife removed, receiving a cow, bedding, &c., which were given to him; that he had the mare in the winter, but returned her last spring, and never owned her exclusively; that he had helped to plough the field in which the wheat was sown, &c., the seed wheat having been taken out of the common barn. There was also evidence, that a few days before his death the intestate said he would thrash the wheat on the ground if he could get a machine, and if not, that he would take it to the barn; and that the plaintiff had admitted the wheat was to go, as far as it would, to pay the debts, being the last instalment on a note discounted; that the farm was all one; and that the mare belonged to the farm.

The learned judge then left the case to the jury, saying, there was no evidence for the plaintiff of property in the intestate exclusively, in the wheat and horses sued for, and a demand and refusal sufficient to shew a conversion; that, on the other hand, there was strong evidence for de-

endants, that the possession and property were joint—in which event no conversion was proved; also, evidence of an agreement that the grain should go to pay the price of the land secured by a note; that if the intestate was the sole owner of the wheat and horses, the defendant had no right to apply them in discharge of his debts, even though he had agreed to such an application; but if the wheat &c., raised on the farm was raised for all, for the special purpose of discharging joint or common liabilities, it contradicted the notion of a separate property.

The jury found for the plaintiff, 62*l.* 4*s.* 10*d.* damages.

In Michaelmas Term, 14 Victoria, *Wallbridge*, for defendant, obtained a rule calling on the plaintiff to shew cause why such verdict should not be set aside and a new trial had, the verdict being contrary to law and evidence, or the weight of evidence, and the judge's charge, and for excessive damages, and on grounds disclosed in affidavits filed.

In Hilary Term, 14 Victoria, *Hagarty, Q. C.*, shewed cause for the plaintiff, referring to the judge's notes and affidavits filed, and relying on the case as appearing on the notes, and on a number of affidavits filed in reply to the affidavits filed on the defendant's behalf.

Wallbridge, in reply, cited *Jeffrys v. Hall*, 1 Vernon, 217, that at law the right of possession survives, though divisible in equity—1 Wm.'s Exs. 404, 411; that to constitute an actional conversion by a joint owner, there must be a distinction of the property, or that which is equivalent to it—*Mayhew v. Harris*, 18 L. I. C. P. 179, *Fennings v. Greville*, 1 Taunt. 241; and he relied on the strong evidence of joint ownership given on the defendant's behalf—*Heath v. Hubbard*, 4 East, 110; 4 Esp. 205, S. C.; that an undivided portion did not vest in the plaintiff—Wm.'s Exs. 404, 411; that the affidavits were to be contrasted, the question being whether the intestate and defendants were joint tenants, or the former sole owner.

MACAULAY, C. J.—The plaintiff's case is not weakened, but strengthened by the affidavits filed on her part, if it is proper to notice them on this application. We are not trying the cause on affidavits. All the persons whose affida-

vits are filed on this application might have been called by the parties at the trial, respectively, had they desired the aid of their testimony; not having been called, these affidavits do not, on principle, appear to me to be admissible, and should not be allowed on taxation of costs.

The defendants seem to justify the taking of the goods on two grounds, principally on that of joint ownership, but also on a claim to apply them towards the satisfaction of a joint debt, alleged to have been contracted in the purchase of the farm.

Who was or became the owner of lot No. 19, on the death of the intestate, is not clear, nor are the merits fully disclosed in the evidence given at the trial, as the learned judge who tried the cause, says he remarked to the jury. The case was, however, left to the jury under a charge favorable to the defendants, and I cannot say the the jury came to a wrong conclusion, although my own mind may, on reading the notes of the evidence, have a contrary tendency. It was a question of fact for the jury; and as I do not perceive the features of the case, as respects the evidence in the plaintiff's favor, would be materially altered upon another investigation, and as I cannot say I consider the verdict contrary to law and evidence or the judge's charge, or that the damages are excessive, if the plaintiff is entitled to recovery at all, I am not disposed to disturb the verdict, and think the rule should be discharged.

McLEAN, J., and SULLIVAN, J., concurred.

DOE DEM. CALLAGHAN V. CALLAGHAN.

Where an action of ejectment is brought by the heir-at-law against his ancestor's widow, and the demise is improperly laid before the 40 days of quarantine have expired. *Held*, that the demise may be amended by the judge at Nisi Prius, and that evidence of the ancestor's possession was rightly received. *Held*, also, that quarantine extends only to the mansion or dwelling house in which the widow is entitled to reside concurrently with the heir.

The declaration is entitled as of Easter Term, 13 Victoria, —to wit, the 21st of August, 1850—for ten messuages, ten cottages, ten barns, ten stables, ten coach-houses, ten out-houses, ten yards, ten gardens, ten orchards, 1,000 acres of woodland, 300 acres of land covered with water, and 300 acres of other land, with the appurtenances, being in the

township of Vaughan, and being composed of part of the west half of lot No. 2, in the 9th concession of the said township of Vaughan. The demise is laid on the 1st, and the ouster on the 10th day of August, 1850.

The consent rule of Trinity Term, 14 Victoria, and the defendant therein, as tenant, agreed to accept a declaration in ejectment for the premises in question, which premises she thereby admitted to be or consist of part of the west half of lot No. 2, in the 9th concession of the township of Vaughan, and at the trial she confessed lease, entry, ouster, and possession. The lessor of the plaintiff, an infant, and the nephew and heir-at-law of the defendant's late husband, Charles Callaghan, offered in evidence a deed executed by Messrs. Allan & Jones, as commissioners of the Canada Company, under seal, dated the 6th of April, 1833, to Charles Callaghan, for the west half of lot No. 2 in the 9th concession of the township of Vaughan, 93 acres, in fee, in consideration of 60*l*.—Registered 25th of April, 1833. There was also proof of his possession under such deed for a number of years, and that he died in possession of the premises on the 7th July, 1850. The defendant, his widow, of whose marriage with the deceased, evidence was given, continued in dwelling-house on the premises in question, and still remains therein. The action is brought after the expiration of forty days, but the demise is laid within the forty days after the death of the plaintiff's ancestor. The learned judge who tried the cause refused leave to amend the demise. There was no evidence of an actual ouster of the plaintiff's lessor by the defendant; the defendant's counsel objected to the proof of the deed from the Canada Company, the want of title in the Company, and to the admission of evidence of possession; also contended that the demise being within the period of the widow's quarantine, the action fails, as she was then entitled to reside in the mansion house, was not a trespasser, and could not be turned out. The plaintiff submitted that there was no sufficient proof of her marriage, or of her being entitled to quarantine.

The learned judge ruled the plaintiff entitled to recover,

whether she was the widow or not, and the jury found a verdict for the plaintiff. Leave was reserved to move nonsuit on the point of quarantine.

In last Michaelmas Term, *Phillpots* obtained a rule, calling on the plaintiff to shew cause why a nonsuit should not be entered, or the verdict set aside, as against law, evidence, and for mis-direction. The questions on the first point being, whether the action was maintainable on the present demise, and if not, then whether the right to quarantine was confined to the dwelling-house or extended to the whole estate.

Dempsey shewed cause, and contended that the deed was sufficiently proved, and if not, that the possession was ample proof of title as against the defendant; that the evidence of defendant's marriage was insufficient to entitle her to quarantine, and if otherwise it was not a legal defence, or if it was that it had been waived by her adversely contesting the proof of title in her former husband, and under whom she claims a right to dower; that no demand of possession was necessary, and that at best, her quarantine could only extend to the house, for which alone she should have defended.—5 Cru. Dig. 254; 4 Kent's Com. 61, 62.

That admitting her right to quarantine, the lessor of the plaintiff had a right to enter and to possess concurrently with her, and that she only had a naked right to reside in the house, not to possession of the estate; and that afterwards, resisting his right to enter was ouster enough to entitle him to the action within 40 days.

Phillpots, in reply, urged that the proof of title in the Canada Company was not given, nor the deed duly proved, and that the evidence of possession should not have been admitted.—1 Star. 72; *Stevens v. Webb*, 7 C. & P. 60.

Duncombe v. Daniel, 8 C. & P. 222.—That there was ample proof of marriage, the defendant and plaintiff's uncle having lived together as man and wife for upwards of fifty years.

As to quarantine, that Mag. Car. says messuage, which may include the whole tract or farm.

That neither declaration nor consent rule define the pre-

mises or shew that defendant defends for more than that part of the west half of the lot to which her quarantine extends.—Com. Plg. Dower, A 11 ; Co. Lit. 32 b, 34 b ; 2 Jurist, 16, 17.

MACAULAY, C. J.—As to the proof of defendant's marriage, she must on this application be regarded as the widow, the question not having been left to the jury or decided by them, and there was no doubt of some evidence from which a legal marriage might be inferred.

The learned judge was quite right in admitting evidence of her husband's possession, and, on reading his notes, it appears to me, such evidence was quite sufficient to establish a *prima facie* case of his having died seized.

There was nothing in the notes to shew that such evidence was not given in due course as a part of the plaintiff's case, according to the original design of his counsel—or that it was an after thought, merely resorted to in consequence of the imperfect proof of a paper title ; and if it was, it was in the discretion of the learned judge who tried the cause to admit it. As to the expenses of the witness called to prove the deed, I suppose that being called upon under the rule on that head to admit it, the defendant's attorney refused to do so, which obliged the lessor of the plaintiff to obtain the attendance of the witness ; and if because the proof in other respects—*i. e.* of title in the Canada Company, or of authority in the commissioner—did not go far enough, the costs of the witness cannot be received from the defendant ; it is a matter to be discussed on the taxation. The execution of the deed was proved, notwithstanding objections to its reception in evidence on other grounds—and had the verdict been for the defendant, it does not follow the plaintiff would not have been entitled to expenses of proving such deed ; moreover, if the defendant succeeded to the possession, as widow of the plaintiff's ancestor, or merely entered or remained in possession under a claim of quarantine or right to dower, it was not only inconsistent with such a possession, but not open to her to resist the heir-at-law of her late husband, by putting him to proof of a strict legal title in him at the time of his death. The lessor of

the plaintiff was, however, bound to establish a right of entry as against the defendant on the day of the demise, for in this action he treats her as a trespasser on that day, and the effect of a recovery will be to entitle him to dispossess her and receive mesne profits from that time, subject to her right to recover in damages one-third in respect of her right to dower.—See. Co. Lit. 33^a ; 5 Co. 36, Coulter's case ; Dal. 100 ; 3 Lev. 52 ; Moore, 80 ; 4 Lev. 198 ; Roscoe on Real Actions, 310.

With respect to the widow's quarantine, I do not find authority for holding her entitled to more than a right to reside in the dwelling house concurrently with the heir, and to receive her reasonable maintenance during 40 days after her husband's death ; she is also entitled to what is termed paraphernalia—Wm.'s Exors. 491 ; but I cannot find that she is entitled to possess any portion of the premises beyond the mansion or dwelling house, whatever that includes. The term may be found explained in criminal cases, under the heads of " Arson " and " Burglary."

Mag. Car., C. 7, uses the expression "*capitati messuagio*," which is given in English, in 2 Jurist, 16, as " chief house "—Co. Lit. 5 ; that by the grant of a messuage or house messuagium, the orchard, garden and curtilage, and so an acre or more may pass by the name of a house—Ib., note (11). 4 Cruise's Dig. (1st Ed.) 321, S. 42, Smith v. Martin, 2 Saund. 400. and note (2), shew that the term chief house or messuage does not extend to the whole tract of land claimed in this action, and for which I think it must be intended the defendant defends the action ; she is treated as tenant in possession of the whole, by the lessor of plaintiff. The intent and meaning of the declaration must be presumed to have been explained to her at the time of service ; she has not limited her defence to a part only of the premises claimed, but has defended and confessed herself in possession generally—Doe D. Greaves v. Raby, 2 B. & Ad. 948. Under such circumstances, the plaintiff is clearly entitled to recover to some extent, in short, to all except what is included in the mansion or dwelling house ; and as to that, the objection is strictly technical and purely for-

mal ; for if the demise had been made a few days later, or the learned judge at *Nisi Prius* had allowed the day to be amended as he might have done, (1 D. & L. 49, 10 L. I. C. P. 89 Doe D. Loscombe v. Clifford, 2 C. & K. 448,) the plaintiff would be clearly entitled to the whole, for her right to remain had ceased, and it is not contended that the lessor's right as heir-at-law, was not established in evidence.— See Doe d. Davenport v. Rhodes 11 M. & W. 600. Besides, before her defence on the ground of quarantine can be sustained, it must be determined or assumed that she was the widow—that is, was legally married to the ancestor, under whom the lessor of plaintiff claims, and whom she contends was her husband. This question was not left to the jury. If, therefore, the plaintiff elects to abide by the verdict, he should be restricted in the execution of the writ of *hab. fac. pos.*, by saying, as to the defendant's right to the dwelling house, “concurrent possession or quarantine,” for I do not think he is entitled to turn the defendant out on this recovery ; or a new trial may be granted if he prefers it, in order that the defendant's marriage and claim to be regarded as entitled to dower, and therefore to quarantine, may be decided. In my opinion, the plaintiff could not legally have turned the defendant out of possession, or out of the house, on the day of the demise ; that he could not, at his election, treat her as a trespasser, even by a demand of possession, (which was not proved to have been made,) if she refused to go only in respect of her right to quarantine, and did not refuse to admit the lessor of plaintiff to enter as heir-at-law, subject to her continuance in the dwelling house as the widow of her deceased husband. And this, even admitting that the right of entry of the heir accrued on the death of his ancestor, in all other respects, except to her right to continue in quarantine, she had a license in law to remain for 40 days ; and a license to enjoy, for a fixed time, is equivalent to a lease and right.—Co. Lit. 277 (a).

Had it appeared that the defendant claimed possession of the whole, adversely to the heir, had been guilty of an abatement, in short—such tortious conduct being incon-

sistent with her legal right, would, I dare say, have amounted to a forfeiture of such right, and entitled the plaintiff's lessor forthwith to treat her as a trespasser, and to proceed to eject her accordingly; but the evidence does not shew that during the 40 days she acted in any way adverse to, or in exclusion of the heir as entitled by descent, unless it is to be inferred from the consent rule admitting possession of all the premises on the day of the demise, and the course adopted in her defence in contesting the proof of title in her alleged husband, at the time of his death, to whose possession she seems to have succeeded.

That the plea of not guilty in ejectment, is distributable, and the defendant entitled to a verdict as to any part of the premises claimed in the action, to which the lessor of plaintiff fails to prove a title, see *Doe d. Bowman v. Lewis*, 13 M. & W. 241; 2 D. & L. 667, S. C., *Doe d. Errington v. Errington*, 4 Dow. 602.

According to the case of *Doe Bowman v. Lewis*, the defendant would be entitled to a new trial, unless the plaintiff consented to an amendment of the verdict restricting the recovery; but the rule was not moved on this ground, and the case of *Doe d. Davenport v. Rhodes*, 11 M. & W. 600, is in the plaintiff's favor, if not overruled by later cases.

HALL v. SCARLETT.

Trespass.

3rd plea: that before the said time when, &c., defendant was seized of the goods, &c., in declaration mentioned, and being desirous of selling the same, plaintiff did falsely and fraudulently represent to defendant that he would purchase the same on credit, and agreed to secure the payment to defendant by a bill of sale of said goods, to be subject to a proviso for making void the same upon payment to defendant; and that plaintiff having obtained possession of said goods, refused to pay defendant for the same, or to give him a bill of sale thereof; and that defendant, having discovered such fraud, did seize and take the said goods, and retained possession thereof as of his own property.

4th plea: that after the accruing, &c., defendant delivered to plaintiff, and plaintiff accepted and received from defendant certain goods, being the goods, &c., in declaration mentioned, in full satisfaction, &c.: verification.

Held, that the 3rd plea was bad, as amounting to an argumentative denial that plaintiff was possessed as of his own property; and 4th plea bad, not only for want of a proper commencement and conclusion, but also in the matter of it.

Trespass: for that defendant, on the 1st day of November, 1850, *vi et armis*, seized, took, drove and led away

certain goods and chattels—to wit, four horses, four mares, four geldings, four waggons, four carriages, four carts, four sets of harness, four whipple trees, and four chains, of the plaintiff, of great value, to wit of the value of 100*l.*, and converted and disposed thereof to his own use.

Pleas : 1st. Not guilty.

2nd. Said goods not the plaintiff's goods, &c.

3rd. As to the seizing and taking said goods, &c., and converting and disposing thereof to his own use ; that a little before the said time when, &c., defendant was possessed of the said goods, &c., as of his own proper goods, &c., and was desirous of selling the same ; and thereupon and before, &c., the plaintiff then being in needy circumstances, and fraudulently intending and contriving to obtain possession of the said goods, by the purchase thereof on credit, without ever paying for the same, did then falsely and fraudulently pretend and represent to the defendant that he, the plaintiff, would purchase the same from the defendant for 200*l.*, and secure to him the payment thereof by a bill of sale of said goods, which bill of sale was to be subject to the proviso to be void upon payment of the 200*l.*, on or before a certain day then agreed upon (not stated) between plaintiff and defendant ; that defendant, confiding in plaintiff, and being ignorant of the fraudulent contrivance aforesaid, did assent and agree to that proposal ; and that plaintiff, in pursuance of his said fraudulent contrivance, having so obtained possession of the said goods, did not nor would pay for the same, nor give defendant a bill of sale thereof as security for payment thereof, as aforesaid, whereby and by reason of the premises aforesaid, the said sale and delivery became and was of no force and effect ; and defendant having discovered said fraud, became and was entitled to resume possession of said goods, &c. ; and thereupon, at said time when, &c., defendant, to resume such possession, did seize and take said goods, &c., the same being on the premises of the defendant, and did drive and carry away the same, and resume possession thereof, as of his own proper goods, &c., doing no unnecessary damage to plaintiff, as he lawfully might for

the cause aforesaid—which are the same alleged trespasses in the introductory part of this plea mentioned. Verification.

4th. That after the accruing of the said cause of action in the said declaration mentioned, and after the commencement of this suit, defendant delivered to plaintiff and plaintiff accepted and received from defendant certain goods, &c., enumerating them as in the declaration, being the goods, &c., in the declaration mentioned, in full satisfaction and discharge of the several causes of action in the declaration mentioned. Verification.—Tyr. Plg. 321; Griffiths v. Owen, 13 M. & W. 58; Tyr. Plg. 121; Putney v. Swaine, 2 M. & W. 82.

Demurrer to third plea—Causes assigned inconsistent and argumentative, and no answer; admitting lawful possession in plaintiff, and yet justifying, by reason of supposed fraud or breach of promise, in the plea stated; that the plea does not shew fraud or deceit in plaintiff, but merely a breach of promise or contract: not shewn that the agreement was in writing when the bill of sale was to have been made, or that defendant ever demanded the same, or tendered one for execution.

Demurrer to 4th plea—Causes assigned should have been pleaded to the further maintenance of the action, and concluded with a like prayer of judgment; that the accord and satisfaction, though after action brought, is not stated to have been under seal, and not shewn whether before or after declaration; that it admits the seizure and conversion of plaintiff's goods; not cured by a return of the same goods; that the plea is not applicable to an action of trespass.

Dempsey, for the demurrer, submitted that the 3rd plea amounted to not possessed, which had already been pleaded, and that no fraud was shewn; and that the fourth plea was palpably bad, a return of the goods after action brought, being no plea in bar, and that if good it should have been pleaded against the further maintenance. He referred to Cameron's Rules, p. 63, No. 41; Stephens's Pleading, 219, 395, 396; Putney v. Swan, 2 M. & W. 72; 2 Sand. 47 (a); 1 Roll. Ab. 5; Moon v. Rapheal, 2 Bing. N. S. 310; 2 Scott, 489.

Brock, for defendant, referred to Chitty's Pleadings, 1003, where the force of the 3rd plea is given; *Earl of Bristol v. Welsmore et al.*, 1 B. & C. 514; *Noble v. Adams*, 7 Zant. 59; *Load v. Green*, 15 M. & W. 216; *Raphael v. Goodman*, 8 A. & E. 563. That the fraud need not be stated—See *Johnson v. Dodgson*, 2 M. & W. 657; *Elliot v. Thomas*, 3 M. & W. 170; *Buttemere v. Hayes*, 5 M. & W. 456; *Leaf v. Tuton*, 10 M. & W. 397; *Pawle v. Gunn*, 4 Bing. N. S. 445; *Eastwood v. Kenyon*, 11 A. & E. 438. That the agreement need not be shewn in writing. That the fourth plea is good, all the goods having been returned and accepted.

Dempsey, in reply, said no fraud was stated; no false pretences as in Chitty's Forms; and the only fraud appearing, is merely formal, by reason of the breach of contract alleged, in the plaintiff's not giving a bill of sale.—*Harrison v. Dixon*, 12 M. & W. 142.

MACAULAY, C. J.—If our decision in the case of *Switzer v. Ballinger*, 1 U. C. C. P. R. be correct, it follows, I think, that the third plea to the 1st count is bad, on the authorities therein cited, especially that of *Howarth v. Tolle-mache*, 4 M. & G. 427 (notwithstanding the case in *Moo. & Rob.* 400); for there is no difference in this point between trover and trespass.—*Harrison v. Dixon*, 12 M. & W. 142; *S. & C.* 1 D. & L. 454; *Taylor's Ev.* S. 231; and the forms in the books of precedents—see Chitty's Jur. Forms, 676, 678, 61, 673 (e), 749, No. 28, note (g).

It may be difficult to reconcile this conclusion with some of the cases and the new rules, (*Cameron's Rules*, p. 57 No. 4, and 60 S. 2nd, and *ib.* p. 55, S. 3rd,) as to the effect of the general issue in actions on the case, and in assumpsit, and the necessity for pleading in confession and avoidance when the defence is fraud; but the later authorities seem against the necessity for its being specially pleaded in trover or trespass, and I do but yield to authority as I understand the case.

The plea of not possessed is apparently the proper one. It may be a question, also, whether the plea in the matter of it, is sufficient to avoid the sale and apparent delivery to the

plaintiff. It does not exhibit a case of false pretences, but rather a breach of contract, which in ordinary language of pleading is called fraudulent.—Gall v. Coomber, 7 Taunt. 559 ; 2 Mar. 366 ; Earl of Bristol v. Wilsmore, 1 B. & C. 514 ; Williamson v. Taylor, 5 T. R. 175 ; 1 Moo. & Rob. 479 ; 2 Mont. & Ayr. 39 ; Load v. Green, 15 M. & W. 216. At all events, if the sale was void for fraud, and the possession not therefore changed, it is open to the defendant to prove it under the plea of not possessed, which puts in issue the title and right of possession as between those parties.

4th. As to the 4th plea, it is clearly bad, not only for want of a proper commencement and conclusion, but in the matter of it also.—18 L. J. Ex. 261 ; Corbett v. Swinburne, 8 A. & E. 673 ; Weeding v. Aldrich, 9 A. & E. 861 ; Ratton v. Davis, 1 Q. B. 496 ; Gibbs v. Pike, 8 M. & W. 228 ; Hilton v. Edwards, 6 C. & P. 677.

Restoration of goods already converted, after a right of action vested and an action brought, is not pleadable as an accord and satisfaction *puis d'arien continuance* ; it is only evidence in mitigation of damages.—Ty. Plg. 321 ; Griffiths v. Owen, 13 M. & W. 58, and cases cited there by Pollock, C. B., *ib.* P. 63.

Judgment should be for the demurrer.

McLEAN, J., and SULLIVAN, J., concurred.

BURNEY V. GORHAM.

After a conviction by a magistrate is quashed, *case* will not lie against him, unless the acts complained of be proved to have been committed by him without any reasonable or probable cause, and maliciously, and the question of malice must be left to the jury.

The first count states, that defendant was and is a justice of the peace for the county of York, and maliciously intending to injure the plaintiff, and without any reasonable or probable cause—to wit, on the 6th of June, 1850—convicted plaintiff, on the information of William N. Richardson, of certain trespasses by him charged against said plaintiff, and adjudged him to pay therefor a fine of five

shillings, and eleven shillings and ten pence costs—and in case the plaintiff made default in payment thereof, and if no goods of his should be found, then that he should be imprisoned in the gaol of the county of York for one month; that defendant, on the 19th June, maliciously issued his warrant for the committal of the plaintiff to such gaol for the term aforesaid, under which plaintiff was committed to such gaol, and there remained till discharged, whereby he incurred expense and loss, &c.; that, on the 26th September, the said conviction was quashed by this court, &c.

Plea: not guilty per statute.

It appeared in evidence, that one Aaron Guernsey, at a bailiff's sale in Newmarket, bought some hop-poles, as belonging to one Phillip Lines, but in which one William N. Richardson claimed to have a joint interest; that a day or two after the sale, which took place in the beginning of May last, the bailiff went on the premises of Richardson, where the poles were, and delivered them to the purchaser, and told him to take them away—but at that time the ground being low and wet, it was almost impossible to enter on the premises to take them, and he went three or four weeks afterwards, accompanied by the plaintiff to assist him; that they went on the premises with a horse and waggon, and removed the poles from where they were stacked in heaps. In entering, a fence closing an old gateway had been taken down, but was nailed up again.

On the 25th May, 1850, the aforesaid Richardson made an information and complaint before the defendant, who was a justice of the peace for the county of York, that the plaintiff and Guernsey did, on that day, maliciously trespass on the said Richardson, by driving a waggon and horses across his hop yard several times, to the great damage of the hops. In consequence of which, the defendant, on the third of June, issued a summons to the plaintiff, reciting the complaint and commanding his appearance at a house named in the township of Whitchurch, on the 5th of the same month. The plaintiff appeared, and on the 6th June, the defendant convicted the plaintiff—for that he, on the 25th May last, did *maliciously* trespass on the said William

N. Richardson's hop yard, by driving a horse and waggon across said hop yard several times, after being requested not to do it, to the damage of the said hops—and adjudged him, for his said offence, to forfeit and pay five shillings, and also eleven and ten pence for costs, to be paid in ten days, and in default whereof and no effects found, to be imprisoned in the gaol of the county, at Toronto, for one month, unless the said sums should be sooner paid.

The fine and costs not being paid, the defendant on the 19th June, issued a warrant for the plaintiff's commitment, and he was accordingly arrested at Whitechurch, and conveyed to the gaol; where he remained from the 18th June, to the 3rd July, when he paid sixteen shillings and ten pence fine and costs, and was discharged. On the 28th August, a writ of *certiorari* issued out of this court, under which the conviction was removed into this court, with information, statements of the witnesses, and warrant thereto annexed. On the 26th September, the conviction was quashed, the particular grounds not appearing in the rule of court.

The papers and proceedings before the court on the application to quash the conviction, were handed into court by the plaintiff's counsel during the trial, but were not read to the jury.

In further support of the case the plaintiff gave oral evidence to the effect that after Richardson and his son had been examined against the plaintiff, by the defendant, he (the plaintiff) urged that Guernsey and he had gone on the premises as a matter of right to take away the hop poles, and that they offered to prove such right and the circumstances under which they had gone into the hop yard, but that the defendant refused such evidence, and said his mind was made up; that he consented to examine a witness named Wallace, to please Guernsey, but would pay no attention to what he said; also saying that it was no use to call witnesses to prove their right to go on the land to take the poles, as the alleged trespass was to the hop garden, to which he would confine himself; that Richardson did not object to their taking down the fence, but coming into

the yard and taking the poles, and that he wished them not to trample on or drive over the vines ; that the hop yard contained about four acres, and the waggon was driven into the yard and up to each of the stacks taken away ; that no damage could have been done to the hops even had they been run over, the plants not being over the surface of the ground at the time, but that defendant said it was of no consequence what amount of damage had been done to the hops of which Richardson complained, that it must be decided elsewhere or in some other shape.

Evidence was also given of exclamations and expressions made by the defendant, to shew irritation or precipitancy and over-confidence as to the correctness of his proceedings ; also of some previous transaction in which plaintiff was a party on the defendant's complaint and acquitted, when defendant said he had escaped him that time, but he might catch him some other time.

The substance of such evidence was that the defendant was of opinion a person in another field might be complained against as trespassing, and yet no reason for the entry or of the damages could be received. The costs of the *certiorari*, &c., were proved to be about 7*l*.

The defendant's counsel moved a nonsuit, on the ground that in this action the plaintiff should shew the evidence on which the conviction was professedly founded, which had not been done—*Burley v. Bethune*, 5 Taunt. 580 ; but it was refused, the learned judge thinking the defendant had acted without jurisdiction, and therefore it was not necessary to shew that the conviction was not founded on sufficient evidence, as must be done where a justice of the peace is charged with having convicted without reasonable or probable cause, and maliciously, in a case over which he has jurisdiction.

The defendant then called Richardson, his son, and another witness, who stated that Richardson was in partnership with Lines in the hop yard ; that while at work in the hop gardens, a horse and light waggon came in and drove over the hops ; that the horse stood in the centre of one hill, and the waggon across another. The young vines being then up

an inch or two, and having been dressed about a fortnight, and that the vines were injured; that the plaintiff and Guernsey were told not to travel on the hills, and to leave the premises, but they paid no attention to that and took several loads away, when complaint was made to the defendant—and that all this was given in evidence before him; there was also evidence that defendant had acted considerately and kindly.

A tender of ten shillings amends was admitted.

The learned judge told the jury, a magistrate was entitled to the protection of the law and the consideration of juries in all cases where he acts in the performance of a duty and happens to err in judgment in a matter over which he has jurisdiction; but that if he assumed a power which the law did not give him, in a matter not within his jurisdiction, he must be held accountable for any injury arising from the exercise of such power; that the plaintiff and Guernsey had claimed a right to enter the hop yard to take away certain property purchased by the latter; that the question of right to enter the hop yard was one which the law did not intend to give a single magistrate power summarily to decide; that if the right was questioned by the party in possession, the only mode of trying it was by a suit and the verdict of a jury; that, according to the construction of an act 4 and 5 Vic. ch. 26, the defendant, when the claim of right was set up *bona fide*, should at once have dismissed the case as one over which he had no jurisdiction; that, having acted in a matter over which the learned judge was of opinion he had no right to take cognizance of, the defendant was liable for such damage, as the plaintiff had in fact instanced, in consequence of his acts; that if the defendant had jurisdiction in the matter, and the conviction was set aside for want of form, then the plaintiff would be entitled to recover the penalty which he was obliged to pay, 16s. 10d., and 1s. damages; but no damages or costs if the defendant could prove that the plaintiff had been guilty of the offence charged against him, but that the protection of that statute extends only to magistrates acting within their jurisdiction; also that the jury had nothing to do with any-

thing that occurred in the hop yard, and that the evidence of what occurred therein, though received, was inadmissible.

The jury found for the plaintiff, with 12l. 10s. damages.

If the notes of the evidence given before the defendant, and annexed to the *certiorari*, be looked into as in evidence, they will be found to contain statements in favor of the defendant's guilt, as strong as the oral evidence given by the same witnesses at the trial of this cause.

In the early part of last Trinity Term, *Dr. Connor, Q. C.* obtained a rule on the plaintiff to shew cause why the verdict should not be set aside for misdirection, and as against law and evidence,—contending there was jurisdiction, proof of the plaintiff's guilt, and no evidence of malice; and if there was, that the question of malice was not left to the jury.

Dempsey, shewed cause. He referred to the statute 43^{*} Geo. III. c. 141, s. 2; 2 W. IV. c. 4, secs. 4 & 5; 4 & 5 Vic. ch. 26, secs. 21, 22 & 24; Roscoe's Evidence, 597; Hunt v. Anderson, 3 B. & Adol. 341; 2 Chitty's Gen. P. 191; Parrington v. Moore et al. 2 Ex. R. 223; and contended that the defendant had no jurisdiction; that the plaintiff sold under a fair claim of right, proof of which the defendant refused to receive; and that there was no proof of a malicious trespass; that the evidence shewed the want of reasonable or probable cause for the conviction, and that such conviction was malicious. Also, that all the proceedings in quashing the conviction were put in and in evidence, including the defendant's own notes of the evidence before him.

Dr. Connor, in reply, urged, that the conviction being quashed could not be now used against the defendant; and that, being an action on the case and not trespass, the plaintiff, to shew want of probable cause, should have proved the evidence given before the defendant on which he convicted the plaintiff, which he had not done; and that in its absence, the court or jury could not know whether he had jurisdiction or reasonable and probable cause, or not.

That there was proof of jurisdiction; and, if not, there was at least sufficient proof that the defendant had reason-

able and probable cause to suppose he had; and that there was no proof of malice. Also, that whether the conviction was malicious or not was not left to the jury.

That plaintiff was legally convicted on the evidence (2 W. IV. c. 4, s. 5) at the end.

That the learned judge erred in excluding proof of what occurred in the hop garden after plaintiff and Guernsey entered.—*Massey v. Johnson*, 12 East, 67; *Gray v. Cookson, et al.*, 16 East, 13.

He relied on statute 4 & 5 V. c. 26, s. 22; and cited East P. C. 1062, as to what constitutes evidence of legal malice in a case of malicious trespass.

That the proviso in section 24 was not retrospective, and did not extend to sections 22 or 23.

That section 24 is unlawfully *and* maliciously, section 23 unlawfully *or* maliciously; and that whether plaintiff and Guernsey had entered an action, as they did, under a reasonable supposition of right, was on the evidence, a question for the defendant to decide.—*The Queen v. Dodgson*, 9 A. & E. 704.

That the real complaint was injury to the hop plants, of which there was sufficient evidence to justify a conviction.—*Alway v. Anderson* 5 U. C. Q. B. R. 34; *Delegal v. Highley*, 3 Bing. N. S. 950; *Gibson v. Chaters*, 2 B. & P. 129; *Ponton v. Williams*, 2 Q. B. 169; *James v. Phillips*, 11 A. & E. 483; 11 Q. B. 39; 5 D. & L. 371; *Turner v. Ambler*, 10 Q. B. 252, 168; *Burley v. Bethune*, 5 Taut. 580; 1 Mod. 220; *Ackland v. Adams*, 7 U. C. R.

MACAULAY, C. J.—It may be that, if void on the face of it, the plaintiff might have brought an action of trespass although the conviction was quashed, as he could have done had it not been quashed, notwithstanding the statute 2 W. IV. c. 4, s. 4, which is founded on the imperial statute 45 Geo. III. c. 141, s. 2 (*Baylis v. Strickland et al.* 1 M. & G. 591; *Jones v. Gurdon*, 2 Q. B. 600); but having elected to bring an action on the case under the provincial statute, it was incumbent upon him to prove that the acts complained of were done without any reasonable or probable cause, and maliciously.—*Massey v. Johnson*, 12 East, 67, 82;

Gray v. Cookson et al. 16 East, 21 ; Rogers v. Jones, 3 B. & C. 409. And I do not think the question of *malice*, which was one of fact for the jury, was left to them by the learned judge with sufficient distinctness ; that the objection is open to the defendant's counsel, and that there should be a new trial on this ground without costs. I do not desire to anticipate the facts, as they may appear at a future trial, and will only observe in relation to other points that have been raised.

1. That it is incumbent on the plaintiff to prove the evidence given before the defendant on which he convicted the plaintiff, in order to shew the want of probable cause. In *Burley v. Bethune*, 5 Taut. 585, Gibbs, C. J., said, " In an action against the magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether upon the hearing there appeared to be any.

The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place.

The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him.

The cases of *Cane v. Mountain* (1 M. & G. 257), *The Queen v. Bolton* (1 Q. B. 66), relate to the subject of jurisdiction ; as to which, I must say, it appears to me, Richardson's complaint before the defendant on the 25th May, was not merely that the plaintiff and Guernsey had maliciously trespassed upon him by driving a wagon and horse across his hop yard, but that they had done so several times to the great damage of the hops, and the subsequent conviction is found in similar terms.

2. As to plaintiff's and Guernsey's right to enter and remove the hop poles—admitting that the bailiff had a legal right to have seized, removed, and sold them, and that he had seized them before the sale, it may still form a question whether the vendee could (especially after the lapse of a reasonable time) enter without the leave and license or

against the will of the person in possession of the close, and take them away, especially with a team, if injurious to the close or anything growing therein.—Peacock v. Purvis, 2 B. & B. 262, 366; 5 Moor, 79; Burley v. Bethune, 5 Taut. 580; 1 Mar. 17; Patrick v. Colerick, 3 M. & W. 483; Vin. Abr. Trespass, H. 2 Pl. 2; Williams v. Morris et al. 8 M. & W. 488; Wood v. Leadbitter, 13 M. & W. 838; Playfair v. Musgrove et al. 14 M. & W. 239; Wood v. Manley, 11 A. & E. 34; Carrington v. Roots, 2 M. & W. 248; 5 U. C. R. 96, 34, 43; 2 Roll. ab. 567, 140 ib. 564; Feltham v. Cartwright et al. 5 Bing. N. S. 569; Wilton v. Edwards, 5 C. & P. 677.

3. Also, whether if in law licensed to enter, and they afterwards abused such license by wantonly or negligently or (though forbid) wilfully doing damage, they did not become trespassers *ab initio*.—8 Co. 146; 3 Wil. 20; Campbell v. Wilson, 3 T. R. 294; 1 H. B. 55; 1 T. R. 338; 1 Saund. 300; d (a); 2 W. B. 1218; 4 East, 395; Roscoe Real Estate, 668.

4. And at all events, whether the evidence did not present a case *prima facie* under the statute 4 & 5 V. c. 26. s. 21, 22, or 24; the two former sections of which make the unlawfully and maliciously destroying, or damaging with intent to destroy, any plant, root, &c., &c.—the latter section makes the wilfully or maliciously committing any damage or injury or spoil to or upon any real or personal property whatsoever, for which no remedy or punishment was thereinbefore provided—offences punishable summarily.

5. If only under section 24, the proviso would apply if it appeared to be a case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of; but, if under either of the former, the question would arise whether the proviso extends thereto, it is not necessary at present to express an opinion, but I am disposed to think it only relates to the 24th section. And wherever it applies, the necessity for resorting to it shews that the magistrate had jurisdiction.—2 Chitty's Practice of the Law, 191–2.

The claim must not be colorable; and it must therefore

rest with the magistrate to decide whether it be reasonably established, and he may draw reasonable conclusions from the evidence.—*Kinnersley v. Orpe*, 2 Doug. 517; *Hunt v. Anderson*, 3 B. & A. 341; *Hughes v. Buckland*, 15 M. & W. 346, 357.

Regina v. Dodgson, 9 A. & E. 704; *Parrington v. Moor*, 2 Ex. R. 223, was a case of trespass against the person who apprehended the plaintiff, a supposed offender.—*Butcher v. Turley*, 2 C. & P. 585; *Charter v. Greane*, 13 Jurist, 208.

6. Upon the plaintiff's evidence, it becomes, in a case like the present, a question for the court, whether, assuming the facts or certain facts to be true (as to which if uncertain the jury must decide), there was a want of reasonable and probable cause for the conviction, &c.; and if so, then, secondly, a question of fact for the jury whether it was malicious.

7. And in the end of the case, it of course must appear upon all the evidence whether the defendant established either the guilt of the plaintiff or reasonable and probable cause for convicting him, or repelled the imputation of malice.

SULLIVAN, J.—The 4th section of the provincial act 2 W. IV. c. 5, was intended to protect justices of the peace in all actions whatsoever, for or on account of any convictions by them had or made under or by virtue of any statute, in case such conviction shall have been quashed. In such a case, the plaintiff complaining of a wrongful conviction and an imprisonment or levy by its authority—if the justice had jurisdiction, and the conviction is not void on the face of it—is driven to an action on the case, the foundation of which is the malice and the want of reasonable and probable cause for the conviction, unless he chooses the action of trespass, in which he would be allowed to receive only one shilling damages and no costs of suit.—1 M. & G. 591; 2 Q. B. 600. The present action being on the case, and the declaration alleging malice and the want of reasonable or probable cause, and the act complained of—namely, the imprisonment of the plaintiff, having been established beyond dispute, the question for trial under

the plea of not guilty was, whether or not the conviction and subsequent proceedings were malicious and without reasonable or probable cause? The conviction was for driving a waggon over the complainant's hop yard to the damage of the said hops, by which, I suppose, was intended hops growing in the yard. It may have been in the mind of the defendant a conviction upon the 22nd section of the statute 4 & 6 Victoria, c. 25, for *unlawfully* and maliciously destroying, or damaging with intent to destroy the hop plant, or the defendant may have intended his conviction to be under the 24th section of the statute for *wilfully* or maliciously committing damage, injury or spoil upon real or personal property. Dr. Connor, the defendant's counsel, argued that the proviso to the 24th section in favor of the party trespassing under a fair and reasonable supposition of right to do the act complained of, was confined to that clause of the statute, and that the conviction was upon the 22nd section, under which the party maliciously destroying, or damaging with intent to destroy a cultivated root or plant used in the course of manufacture, is not excused, or the jurisdiction of the justice of the peace ousted, even by a fair and reasonable supposition of right in the trespasser. I have, upon reading the statute and the case cited—The Queen against Dodson (9 Ad. & El. 704)—no doubt but that the distinction was correctly taken between the two sections of the act. And then, supposing the conviction to have been under the 22nd section, and the proceedings before the justice of the peace to have been put in as evidence upon the trial of this cause, which the plaintiff insists they were, the entry by the plaintiff was manifestly illegal; and as, according to the depositions, he was warned that his driving his waggon over the hop yard would injure the hops growing there, and he nevertheless persisted, I cannot say that, even supposing it to have been manifest to the justice of the peace, that the plaintiff sincerely supposed he had the right to enter with his waggon to take the hop poles, which he thought were his property, that the defendant, in convicting him of maliciously injuring the hop plants, unlawfully and with intent

to destroy them, was convicting without reasonable or probable cause. The lawfulness or illegality of the entry upon the hop yard was at the plaintiff's own risk, and if he knew that the consequence of the driving over the ground would be the probable destruction of the plants growing there, or rather if the convicting justice had evidence to lead him to the opinion, that the plaintiff knew or was made aware of the probable injury to arise from his acts, it seems to me that the magistrate cannot be fairly charged with a malicious and unfounded conviction. The act of the plaintiff was unlawful, and there was testimony before the justice to shew that the plaintiff, although he did not enter for the sole purpose of injuring the plants growing in the hop yard, yet was very indifferent as to the injury which his entry might occasion.

Then, supposing the conviction to have been intended to be upon the 24th section, which contains the proviso excusing trespassers who have a fair and reasonable supposition of right; and allowing that the plaintiff fairly and reasonably supposed that he had the right to enter the hop yard to take the poles, it is manifest that he could have no supposition of right in himself to do unnecessary damage.

The poles might have been taken away without entering the hop yard with a waggon, yet the plaintiff, notwithstanding the remonstrances of the proprietor, entered; and, according to the evidence, by means of the waggon, injured the property. It was for the justice of the peace to say whether the asserted right was pretended or sincerely and reasonably set up. It is not necessary for me to say that I should in his place have convicted the plaintiff; but it does appear to me that it would be great injustice to impute to the magistrate a conviction without reasonable or probable cause.

The learned judge at the assizes fell into the error of supposing, that the mere fact of the fair claim of right to enter and take the poles being contended for before the justice of the peace, he should immediately have stopped the proceedings and considered himself without jurisdiction. The case of the Queen v. Dodson already cited, and

Parrington v. Moore (2 Exch. 223), prove incontestibly that the justice must pass his judgment upon the fairness and reasonableness of the color of right set up; and in reviewing that decision in an action on the case against the magistrate, the judge at the assizes should have pronounced as well upon the correctness of the decision of the justice, as upon the presence or want of reasonable and probable cause for a wrong decision, and then he should have left the question of malice to the jury. Instead of this, he treated the proceedings before the justice as *coram non judice*, and the defendant as a trespasser. I think there was misdirection in the charge; and that if this action can be maintained at all, it must be upon the ground of the defendant having convicted maliciously, and without reasonable or probable cause.

Rule absolute for new trial without costs.

McLEAN, J., concurred.

BENEDICT V. PARKS.

Award—Pleading.

Debt on bond. The defendant set out the condition of the bond on oyer, which was for the performance of the award of arbitrators, to whom it was referred by the plaintiff and defendant to "arbitrate, award, order, judge and determine upon and concerning the possession" of a certain specified lot of land and premises, "and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, quarrels, controversies, trespasses, damages and demands whatsoever, at any time theretofore, had, made, moved, done, suffered, committed, or depending by or between the said parties, or by reason of any other matter, cause or thing from the beginning of the world to the day of the date of the said bond," and pleaded "no award made."

The plaintiff replied, shewing an award made by the arbitrators at the proper time, and with the proper formalities, "that the said plaintiff should pay or cause to be paid to the representatives of the said Andrew P. Shorts, deceased, within one month from the date of the said award, the amount due on certain notes of hand given by plaintiff to the said Shorts in payment of the land in the condition of the bond mentioned,—and that the defendant should give or cause to be given to the plaintiff or his representatives, on payment of the said notes, a good and sufficient deed in fee simple for said land, and that the defendant should not transfer the said notes within the said month, and that the bond for a deed given by the said Shorts to the plaintiff, should be delivered by the defendant to the plaintiff." The plaintiff then averred notice by the defendant of the award, and assigned two breaches: 1st—that the plaintiff, in pursuance of the terms of the award, tendered to the defendant, who then was the holder of the said notes of hand, and to the defendant's wife, the executrix and representative of the estate of Shorts, the full amount of principal and interest due upon the notes, and demanded a deed of the land, but that they refused to accept the money and the defendant refused to give the deed, although a reasonable time had elapsed; 2nd—that after the tender and refusal in the first breach mentioned, and before suit, to wit, &c., the plaintiff requested

the defendant to deliver to plaintiff the bond for a deed in the award mentioned, and although a reasonable time, &c., had elapsed, defendant did not, nor would deliver the said bond : verification.

The defendant rejoined, setting out the award *verbatim*, and then demurred by separate and distinct demurrers to each of the two breaches—assigning several grounds of demurrer to each breach : joinder in demurrer. *Held per Cur.*, (McLean, J., *dubitante* on the first point), that under the general words of the submission, authority was given to arbitrate as to the fee simple of the land, if it were a matter in difference between the parties, which must be presumed. 2ndly, That the award was void for not deciding upon the matter expressly submitted to the arbitrators respecting the *possession*.

Held also, that the defendant could not, by thus setting out the award in his demurrer by suggestion, make it a part of the plaintiff's replication, as in the case of a deed pleaded with profert ; and that the defendant's demurrer should have been to the replication, and not to the several breaches assigned in the replication. But, upon the whole record, judgment was given for the defendant on the demurrer, because the award, as set out by the plaintiff himself in this replication, was void.

Process issued 18th July.

Declaration, 25th August, 1850.

Debt on bond—made by the defendant on the 24th day of May, 1850, acknowledging himself indebted to the plaintiff in 500*l.*, &c.

Plea—11th September, 1850 : the defendant demanded oyer of the bond, which was set out, and also of the condition likewise set out—being, that if the defendant, his heirs, executors, &c., should and did in all things well and truly stand to, obey, abide by and perform, &c., the award, order, &c. of Gilbert A. Clapp, James Allan, and William Grange, or any two of them, arbitrators chosen on behalf of both parties to arbitrate, award, order, judge, and determine *upon and concerning* the possession of a certain lot of land and premises, being lot number 31, first concession township of Hungerford ; and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, *bonds*, quarrels, controversies, trespasses, damages, and *demands* whatsoever, at any time therefore had, made, moved, done, suffered, committed, or, depending, by or between the said parties, *or by reason of any other matter*, cause, or thing, from the beginning of the world to the day of the date thereof, so as such award be made *in writing, indented under the hands and seals* of the said arbitrators, or any two of them, ready to be delivered &c., on or before the first July next ensuing the date, &c., then to be void, &c.

The defendant pleaded that the said arbitrators did not,

nor did any two of them, on or before the first July, &c., make any award in writing under their hands, or under the hands of any two of them, of and concerning the premises, &c., ready to be delivered, &c. : verification.

Replication—24th September, 1850: that after the making of the said bond, &c., and within the time &c.—to wit, on the first day of June, 1850—the said Allan and Grange, two of the said arbitrators, having taken upon themselves the burden, &c., made their award in writing, indented and under their hands and seals, bearing that date, of and concerning the premises in the said condition mentioned, &c., ready to be delivered, &c., by which said award they, the said Allan and Grange, two, &c., did award and order *that the said plaintiff should pay* or cause to be paid to the *representatives* of the *estate* of Andrew P. Shorts, deceased, within one month from the date of the said award, the amount due on certain notes of hands given by plaintiff to the said Shorts, in payment of the said lot of land in the said condition mentioned; and that the *defendant should give* or cause to be given to the plaintiff or his representatives in payment of the said notes, a good and sufficient deed in fee simple for said lot of land, and that defendant should not transfer the said notes within the said month, and that the bond for a deed given by the said Shorts to the plaintiff should be delivered by the defendant to the plaintiff, of which the defendant had notice.

The plaintiff avers, that afterwards and within one month from, &c., and before suit—to wit, on, &c.—the plaintiff, in pursuance of the said award, &c., did offer and tender to the defendant, *who then was the holder of the said notes of hand*, and to Jane Lobdill Parks, wife of defendant, who was and is executrix to the estate of the said Shorts and *representative to the said estate* in the said award mentioned, the sum of 90*l.* 1*s.* 3*d.* in payment of the same notes, being all the moneys then due and payable by the plaintiff for principal and interest thereon, which said sum of money the defendant and his said heirs, executors, and representatives aforesaid, then and there refused to accept; and that plaintiff then demanded of defendant that he should give

or cause to be given to the plaintiff a good and sufficient deed in fee for the said land; and although plaintiff tendered as aforesaid, and hath been always ready to do all things on his part, and although a reasonable time elapsed before suit for defendant to have given or caused to be given such deed as aforesaid, yet he did not, nor would, when so requested, or at any other time, &c., give or cause to be given to the plaintiff a good and sufficient deed in fee simple for the said lot of land, or any deed or conveyance whatsoever therefor, contrary to the said condition, &c.

2nd. For further breach according to the statute—that after the award, notice to defendant and tender to plaintiff and wife, executrix, and representative as aforesaid, the amount of the said notes as in first breach stated, and after defendant and his wife, executrix, and representative aforesaid, had refused to accept the same, and before suit—to wit, on, &c.—plaintiff requested defendant to deliver to him (plaintiff) the said bond for a deed in the said award mentioned, given by the said Shorts to plaintiff, and though a reasonable time had elapsed, &c., and plaintiff was ready and willing, &c., and although plaintiff did tender, &c., as aforesaid, yet defendant did not, nor would when so requested, or at any other time, deliver to plaintiff the said bond for a deed, but refused contrary, &c. : verification.

Rejoinder—25th October, 1850: to the first breach, that the supposed award was in the words following, setting it out thus :—Whereas Cornelius Parks and Ard Benedict did each, in a separate bond, dated the 24th day of May, 1850, appoint Gilbert Clapp, James Allan, and William Grange, &c., or any two of them, arbitrators to arbitrate and judge concerning the possession of a certain lot of land and premises, being lot 31, first concession of Hungerford; and also of and concerning all and all manner of actions, suits, bills, bonds, trespasses, damages and demands, whatsoever, up to the date of said bonds. Now, know all men by these presents, that we, the undersigned arbitrators, above named, do award as follows: the said Ard Benedict to pay or cause to be paid to the representatives of the estate of Andrew P. Shorts, deceased, within one month from the

date hereof, *the amount due* on certain notes of hand given by the said Ard Benedict to the said Andrew P. Shorts, deceased, in payment of said lot of land; the said Cornelius Parks to give or cause to be given to the said Ard Benedict or his representatives, on payment of said notes; a good and sufficient deed in fee simple for the said lot of land, and that the said Cornelius Parks shall not transfer the said notes within the said month. The bond for a deed given by the said Andrew P. Shorts, deceased, to the said Ard Benedict, to be delivered by the said Cornelius Parks to the said Ard Benedict. Dated at Richmond, the first of June, 1850, signed by James Allan [*L.S.*] and William Grange [*L.S.*],” and two witnesses. And then demurrer to said first breach, assigning for special grounds:—1. That by the submission the arbitrators were empowered to award, &c., concerning the possession of the lot of land mentioned, and also all manner of actions, &c., setting out that part of the condition; and that the award directing a deed in fee, was a matter over which the submission did not give the arbitrators any authority.

2. That the fee simple of the said land was not referred, and the award is void.

3. That it is uncertain whether the deed was to be given to the plaintiff or his representatives.

4. That the arbitrators have not decided on the cause and causes of action referred, &c.

5. That they have not awarded concerning the possession of the said lot, being a distinct matter referred.

6. That the reference was to three, whereas two only acted, without shewing notice to the third of their meeting, &c., or his refusal, &c.

7. That the award directs a sum of money to be paid to the representatives of Shorts, strangers to the submission, and the same is the consideration for which defendant is required to perform his part; and so, the act to be done by plaintiff not being compulsory but void, the acts to be done by defendant fail also.

Demurrer to second breach: causes assigned—1. No authority by the submission to award respecting the giving up of the bond.

2. Not shewn that defendant had possession of the bond, or the control thereof.

3. That being to plaintiff, the presumption is, that he is possessed, and that its custody did not come within the terms of the submission.

4. Award void, the arbitrators not having decided on the cause and causes of action referred; also

5. Because they failed to award respecting the possession of the lot, though distinctly referred.

6. The submission to three, two only of whom acted, without shewing notice to the third of their meetings, &c., or his refusal, &c.

7. That the award directs payment of a sum of money to the representatives of Shorts, strangers, &c. (same as No. 7, *supra*).

8. Award not final, not deciding all matters referred, and directing the delivery up of a bond not referred.

9. That plaintiff hath not set out the whole award.

10. Replication double, assigning two separate breaches to one plea.

11. Also double, for assigning a breach, and, as a necessary introduction thereto, asserting matter which in itself is an answer to the plea.

Joinder in demurrer, the 29th October, 1850. The demurrer was argued in Michaelmas Term, 14 Vic. 1850, when *Wallbridge*, in support of the demurrer, contended—1st. That the award might be set out at the head of the demurrer, by suggestion of the defendant.—*Foreland v. Marygold*, 1 Sal. 72-3; 1 Lord Raymd. 715 S. C.; Holt 80 S. C., 12 Mod. 533 S. C. 2 Sand. 62^b (5); *Perry v. Nicholson*, 1 Bur. 281; *Fisher v. Pimbley*, 11 East. 188 (the plaintiff demurred); *White v. Sharp* 12 M. & W. 712, 2nd plea; *Maxwell v. Ransom*, 1 U. C. R. 219; *Gisborne v. Hart*, 5 M. & W. 50; *Dresser v. Stansfield*, 14 M. W. 822

2. That the award is not made of anything referred, not of the possession of the lot, but upon new matter—and that both breaches were bad, being in relation to matters beyond the submission (2 P. & D. 304; *Price v. Popkin*, 10 A. & E. 139); and that such matters were not embraced by the

general words, "all matters in difference, &c."—Roll. Ab. Abt. B. 11, 12, 13; 1 Sal. 76; Purslow v. Baily, 1 Ld. Ray. 1039.

3. As to the second breach, that there was no power in the delegates to award the delivery up of the bond.

4. The award void for ordering the money to be paid to the representative of Shorts, without its appearing that the defendant is such representative, or in any way entitled; that no privity is shewn, but the money required to be paid to one, and the deed to be delivered by another, which is insufficient, unless it can be collected from the whole award that the payment is for the benefit of the party to perform—Dyer, 242 (15); Bedham v. Clerkson, 1 Ld. Raymond, 123. That the award directing performance on plaintiff's part to a stranger, is void, and being the consideration and conditional, all fails. He cited 1 Saund. 9, 33 (a); 2 Saund. 336 (e); and 1 Roll. Ab. 259; 3 Moore 72, 73 (quære 674); 9 D. & R. 404; Wrighton v. Bywater, et al., 3 M. & W. 199; Doe dem. Madkins et al. v. Horner et al. 8 A. & E. 235; 3 N. & P. 344. That a matter referred, (possession) not being decided, vitiates the award.—Randal v. Randal, 7 East, 81; Watson 10, 11; Dresser v. Stansfield, 14 M. & W. 822.

That the award does not on the face of it, profess to be of all matters submitted, nor was it so in fact. It disposes of no action or cause of action, though it mentions a bond to which defendant was no party.

That the award should shew a full compliance with the submission—Ravee v. Farmer, 4 T. R. 146; Seddon et al. v. Tutop, 6 T. R. 607; and is void for want of mutuality.

Richards for the plaintiff contended—

1st. That the court will presume that all matters submitted were disposed of and decided upon, unless the contrary is shewn. It will be intended to be of the premises, and the contrary does not appear on the pleadings—Russell on Arbitrations, 261; Craven v. Craven, 7 Taunton, 642; Allen v. Ellis, 3 N. & P., 553; Gray v. Gwenap, 1 B. & Al. 106; In re Browne v. The Croyden Canal Co., 9 A. & E. 522; Dunn v. Warlters, 9 M. & W., 293; Watson on Awards

202, 233, 367 ; Perry v. Mitchell, 12 M. & W. 798 ; Ingraham v. Milnes, 8 East. 445.

That if uncertain or avoidable by reason of extrinsic facts, such facts should be pleaded.

That the fee includes a disposal of the possession, and nothing extrinsic was shewn, to shew a separate specific decision respecting the possession necessary.

That the word "demands" would include a right to claim the fee, and that the comprehensive terms of the submission prevent the award being void for exceeding the submission.

That all matters in difference were referred, and therefore all matters awarded might be presumed to have been in difference and submitted express to the arbitrators at the hearing ; wherefore, if there were no apparent excess, the award respecting the fee embraces and disposes of the possession as included therein, and all is right, and if susceptible of such construction, the award will be upheld—all reasonable intendments being in its favour.—Cargey v. Aitcheson. 2 B. & C. 170 ; Mitchell v. Staveley, 16 East, 58 ; Gisborne v. Hart, 5 M. & W. 50 ; Perry v. Mitchell, 12 M. & W. 798.

2nd. As to a stranger—that it is alleged the defendant's wife was executrix of Short's estate, and therefore its representative, and he responsible during the coverture.

That the award thus explained, directing payment to her, is equivalent to directing such payment to the defendant ; that there is sufficient privity and the act beneficial, though to be performed to the defendant's wife, instead of himself personally.—Watson, 186.

3rd. As to the bond—that its possession by the defendant should be presumed ; if not possessed, defendant should have pleaded it in denial ; and if not a matter of controversy, he should have so pleaded, otherwise it will be so intended.

4th. That several other grounds of demurrer not having been pressed in argument, he regarded them as abandoned.

5th. That should one part of the award be void, and another good, it will be upheld *pro tanto*, and that therefore one

breach may be good, though the other is not.—Watson, 238; Ingram v. Milnes, 8 East. 445; Doe dem. Williams v. Richardson, 8 Taunt. 697; 15 Price, 533; 7 Dow. 640.

Wallbridge in reply urged, that the validity of the award must depend upon what appears on the face of the submission and award, without the aid of extrinsic averments, as the cases he had cited would shew.

That the *privity* he contended for, should appear on the submission and award distinctly, and not merely by extrinsic averments, and that there was therefore no visible interest in the defendant in the money directed to be paid to a stranger, &c.

MACAULAY, C. J.—I have not been able to satisfy myself that it is permitted a defendant after pleading no award, and after the statement of an award in the replication *prima facie* sufficient to suggest the award and set it out as if oyer had been granted, and then demurr. It is not like a case in which a deed is pleaded with profert; for then each party acquiesces in the correctness of such oyer. It becomes a part of the pleading in which the profert is made, and the original is admitted by the demurrer thereto. In the case of *Foreland v. Marygold*, reported in 1 Sal. 72, 1 Lord Ray, 715, Holt, 80, 12 Mo. 533. To a plea of debton bond to perform an award and no award pleaded, the plaintiff in reply set forth an award with a profert in curia, and the defendant craved oyer and demurred. It is noted at the end of the case (1 Sal. 73), that if the plaintiff had not made a profert, the defendant's way had been to have pleaded *nul tiel agard*, which is said to be the proper course, as in *Farer v. Gate Pal.* 511, Vin. Ab. Abn. (b) Ga (12); See *Kepp v. Wiggett*, 6 C. B. 280; San. 316-7.

The older cases that after a plea of no award and an award and breach replied, the defendant could not rejoin that the award set forth was void for matter in law, as that would be a departure—such as *House v. Lumder*, 1 Keb. 414; *Morgan v. Mann*, 1 Keb. 678, as to which see 2 Sand. 84 (e); 2 Keb. 156; 7 Ray. 94; 1 Lev. 127; 1 Sid. 180; *Morgan v. Mann*, 1 Keb. 673; 1 Lev. 85, 245; 2 Sand. 188; *Harding v. Holmes*, 2 Wil.

122—seems overruled (but see *Maxwell v. Ransom*, 1 U. C. R. 219) by *Fisher v. Pimbley*, 11 East. 188; 1 Sand. 326 note (g); *ib.* 316-17; 2 Sand. 189, note (2); *ib.* 84 (e); *Hicks v. Cracknell*, 3 M. & W. 72; which seems to shew that the plea may be sustained by collateral matter shewing the award stated to be void, and so no award in law, which is consistent with what is said in *Farrar v. Gate*, that he who pleads in the negative shall never take a traverse, and must only maintain his bar—*Vin. Ab., Traverse*, P. 127; *Brovel*. 62; *Caldwell on Arbtre.* 206-7. In *Gisborne v. Hart*, 5 M. & W. 50, Lord Abinger says, that, according to his recollection, it used to be the practice under the old form of pleading when an award good on the face of it was pleaded, to reply specially matter dehors the award, which went to nullify it; or, if the award was bad on the face of it, to demur.—1 C. M. & R. 454; *Young v. Beck*, 5 Tyr. 24; 16 East. 41 *Dudlow v. Watchorn*; and see *ib.* 58; *Mitchell v. Staveley*; *Stephen's Pleading*, 5 Edn. 458, and note (g); *White v. Sharp*, second plea, 12 M. & W. 712; *Dresser v. Stansfield*, 14 M. & W. 822.

The case of *Fisher v. Plimbley*, 11 E. 188, is incorrectly stated in the margin, and in every subsequent reference thereto.

The defendant set out the supposed award in his rejoinder, but it was not the plaintiff who demurred. The plaintiff demurred to the rejoinder as being a departure, and thereby admitted the correctness of the award as set out. If the defendant could set out the award by some suggestion, and then demur for the variance, I do not see how the plaintiff is to contest the fact whether it be set out truly or not. How the rejoinder concluded in *Fisher v. Pimbley* does not appear—probably with a verification; in answer to which the plaintiff might have re-asserted the award as set out in his replication, and taken issue thereon, or have otherwise controverted or objected to it as stated by the defendant. Independent of all this, the award as set out by the defendant, does not, that I perceive, materially differ from the award as stated by the plaintiff in his replication. There was no necessity, therefore, for its being set out, and

that part of the rejoinder may be rejected as surplusage.— See Kepp and another v. Wiggett and others, 6 C. B. 280.

Then the defendant has not demurred to the whole replication, but to each breach separately; and unless a demurrer to the first breach (and so to the second.—Cro. Jac. 557, 1 Saund. 285 (q), 2 Saund. 379, Com. Dig.) must be considered as applying not only to such breach, but to so much of the whole replication (including the award as stated therein and also as set out by the defendant), the demurrer is too narrow; for if the award be admitted and is not embraced in the demurrer, the breaches in themselves are unexceptionable; the award, either as stated by the plaintiff or defendant, warranting the breaches if in itself good. So the question is, whether the defendant, by demurring to the breaches, is entitled to object the insufficiency of the award to warrant any breach, and consequently the breach assigned. In other words, whether the demurrer to each breach is to be considered as extending to so much of the whole replication as relates to such breach, or merely to the breach itself as unwarranted by the award as stated. It is by no means clear that the demurrers are as comprehensive as the defendant supposed; but this was not made a point in the argument; and as both breaches are demurred to on grounds much alike, I think that the proper course is to give judgment upon the whole record as brought before us on demurrer, and to determine whether the award is valid under the submission. If the award, though good in part, was void (for excess or otherwise) in those portions of it on which the breaches are assigned, a demurrer to the breach on that ground, would probably be the regular mode of exception thereto; but here the objection is not that the award is partially invalid, but that it is altogether void. The question however in strictness is, whether under the submission, a valid award is stated that warrants the breaches.

I think it competent to the plaintiff to render certain by averments what is capable of being shewn with certainty; and that he may therefore allege that the defendant's wife is executrix of the will of her father Shorts, and prove the

fact (if denied) by extrinsic evidence. This being shewn, I think it follows that she is the *representative* of Shorts' estate within the true intent and meaning of the award, which by the term *representative* means, not the children or nearest of kin, but the person entitled to payment of the promissory notes also mentioned.

If therefore the main difficulty in the plaintiff's way could be got over, I am disposed to think the minor points would not present any insuperable obstacle to his recovery ; but the difficulty is, whether the award is not void in not having decided upon the matter of *possession*, which was expressly submitted on the face of the condition of the bond. By the condition, the arbitrators were to arbitrate, award, order, judge and determine *upon* and *concerning* the possession of lot number 31, 1st concession of Hungerford, and also of all bonds, &c.

Now the award no otherwise determines upon such possession, than that on payment of the notes within one month as therein provided, it directed that the defendant should give, or cause to be given to the plaintiff, a good and sufficient deed in fee simple for the said lot of land. It may well be said, that a deed in fee would confer seizin, and that such seizin would be of an estate in possession, and at all events entitle the plaintiff to actual possession, if not already in his occupation—consequently, that the decision respecting the fee included the possession as incident, &c.—Crabb on Real Property, S. U. 179, P. 1000 ; Stott v. Stott, 16 East, 351 ; Clayton v. Corby, 2 G. & D. 174 ; 2 Q. B. 813, S. C. ; Purnell v. Young, 3 M. & W. 296 ; England v. Wall, 10 M. & W. 700. Still nothing is said respecting the possession in the meantime, nor does it appear who is possessor. Either party, or a stranger may be in possession ; and it was material that the occupation and enjoyment until the plaintiff had paid the notes and received a deed in fee, should have been distinctly determined, as it was distinctly submitted.

I do not think the submission respecting the possession of the lot, gave the arbitrators a power over the estate in fee, but I think the subsequent general terms of it did so,

as included in "*all demands*," if a subject of difference, and made a point of controversey in the arbitration, as we intend it to have been.—See Watson on Awards, 180 ; Russell on Power of Arbitrators, 425 ; Bel. 97, 98 ; Marks v. Marriot, 1 Ld. Ray. 114 ; Rosse v. Hodges, 1 Ld. Ray. 233, 234 ; Roll. Ab., Ashton, c. 1 ; 3 Bul. 312 ; 2 Saund, 190.

On the same principle I do not think a decision respecting the fee, under the general terms of the submission, involves a decision respecting the possession under its special terms. The award therefore is faulty in not disposing of all the matters submitted, and in a point so material, that I think it renders the whole void. Certainly that point relating to the fee, that is the part on which the first breach is assigned. And also as to the delivering up of the bond mentioned in the second breach, being an instrument closely connected with the same property, and apparently in the defendant's possession, but under circumstances not appearing, and therefore not shewing that the award in relation thereto may well stand, although void in relation to the lot of land itself, which is the subject of such bond. It is unnecessary to consider whether the defendant's wife being executrix of Shorts' estate, or the defendants being possessed of the notes, constituted a sufficient privity, or whether a tender to the defendant's wife was sufficient on his part to entitle him to a deed in fee, or whether the amount due on the notes should have been so stated in the award to render it sufficiently certain on that head.

Then, would some other points cease to be important if the award is entirely void ; How the defendant became possessed of the bond or notes, or interested in this lot of land does not appear. He may possess them all and stand seized of the land under circumstances (such as trustee or a vendor not having conveyed to Shorts or in right of his wife as executrix or devisee or otherwise,) rendering him justly liable to convey to the plaintiff upon payment of the promissory notes. It is not necessary to decide, and it is useless to conjecture.

It is clear that the notes constituted the consideration for the land on the plaintiff's part, whence the *prima facie* in-

ference is, that on payment thereof, he should receive a conveyance of the estate; and no inability on the defendant's part to make such conveyance, or to procure it to be made, is suggested. But, at the same time, he only submitted in express terms, the possession of the lot to arbitration, and touching that, the award is silent, except by contingent implication in the event of the plaintiff's paying off the notes, &c.

I fear this is a fatal omission and destructive of the award, as not being separable from the residue thereof.—Tomlin v. Mayor of Fordwick, 5 A. & E. 147; Madkins v. Horner, 8 A. & E. 382; Robson v. Railston, 1 B. & Adl. 723; Samuel and another v. Cooper and another, 2 A. & E. 752; Kent v. Elstob, 3 East, 15; Randall v. Randall, 7 East, 88; Watson 195; Russell, 252, 253.

McLEAN, J.—By the submission as set out on oyer, the arbitrators were specially empowered to arbitrate, award, order, judge, and determine of, for, upon, and concerning *the possession* of a certain lot of land and premises, being Lot No. 31, in the first concession of the township of Hungerford, and also of, and concerning all, and all manner of actions and *causes of action*, &c.

No award whatever is made as to the *possession* of the lot, but the arbitrators have decided that the defendant shall give to the plaintiff a deed in fee simple for it, on plaintiff's paying to the representatives of one Andrew P. Shorts, the amount of certain promissory notes given by the plaintiff to Andrew P. Shorts deceased, *in payment* of the said lot of land. It is clear the arbitrators could have no control over the *fee simple* of the land, under the power to adjudicate between the parties as to *the possession*, and they could have no power whatever to award as to the fee simple, unless as a *cause of action* pending at the time between the plaintiff and defendant. The express reference of the question *of possession* would seem to exclude any reference as to the *title* in the same premises. It cannot be assumed that the most important part of the matter was intended to be included as a mere *cause of action* referred, when the possession, which must usually *follow* the title,

has been specifically submitted to the judgment of the arbitrators. But, if it could be awarded upon as a *cause* of action merely, by the terms of the award it does not appear to have been adjudicated upon as such. The award recites the reference as to the possession, and also of, and concerning *all, and all manner of actions*, suits, bills, bonds, trespasses, damages, and demands, whatsoever—wholly omitting *causes of action*, and the decision must be taken to be of such matters only as are specified in the recital to which it will apply.

But, if it is even admitted that the arbitrators had power to arbitrate about the fee simple, they have not awarded as to the *possession*—a matter which may be distinct from the *fee* in the land. The plaintiff might be entitled to the fee, and the defendant to a life estate, for aught that appears to the contrary, and this matter is left wholly undisposed of.

Then, as to the bond awarded to be delivered by the defendant to the plaintiff. By the reference, all bonds subsisting between the parties appear to have been referred, but there is no mention of the reference of any right to a particular bond or to the possession of it—that may have been a *cause of action* between the parties, and properly within the submission as such. The award is therefore not conclusive between the parties, and cannot be sustained.

SULLIVAN, J.—It appears to me that the course taken by the defendant in this case, in rejoining to a replication of an award made, and breaches—an award different from the one set out in the replication, and demurring, is contrary to all the principles of pleading. The defendant is demurring upon matter of fact set out by himself, without giving the plaintiff an opportunity of taking issue in fact.

The case of *Fisher v. Pimbley*, 11 E. 188, was cited as authority for this proceeding; but it will be found that in that case, the defendant rejoined without demurring, and that the plaintiff demurred to the rejoinder, assigning a special cause of demurrer. Lord Ellenborough and Bailey, J., are reported to have spoken in their judgments as if the defendant had demurred, and the marginal note of the case also is mistaken in the same point, but the actual pleadings

are shewn by the statement in the body of the case. Such a rejoinder has in fact the effect of a demurrer, if the award be truly set out by the defendant, for it forces the plaintiff to demur, and the defendant supports his rejoinder by objecting to the award.—See Russell on Award, 502.

In *Gisborne v. Hart*, 5 M. & W. 50, the defendant, in debt on an award, pleaded, setting out an award and matters referred. The plaintiff replied matter of fact, to which defendant demurred.

In *White v. Sharpe*, the defendant, in debt on an award, pleaded—1st, no award; 2nd, setting out the order of reference and award *verbatim*, and issue is taken on the fact, neither party demurring.

I can find no case in which this course of pleading is followed. If the award were held to be a deed, of which a *profert in curia* might be made, and oyer given on demand, the defendant might set out the award upon oyer, and demur; but it is clear that it is not so held.—See 2 Saund. 62, a. n. 5; *Doel v. Herbert*, 1 Burr. 281; Sty. 489.

It is said, that in debt on bond, the plaintiff is bound in his replication to set forth the whole of the award.—*Foreland v. Marigold*, 1 Sal. 72; *Perry v. Nicholson*, 1 Bur. 278; *Forland v. Hornigold*, 1 Lord Ray. 715, said in *Perry v. Nicholson* to be the same case with *Foreland v. Marigold*. *Bacon v. Dubarry*, 1 L. Raym. 246: N. B.—In that case the award was pleaded as a deed with a *profert in curia*, and the defendant craved oyer and demurred. In the case of *Perry v. Nicholson*, the distinction is expressly taken between the action of debt upon the award itself, and an action of debt on bond.—2 Saund. 62 (b) N. 5.

Mitchell v. Staveley, 16 E. 58, shews that a defendant who wishes to shew in debt upon a submission bond, that other matters in difference were not decided, must set out the whole award. See this case, remarked on by Alderson B., in *Dresser v. Stansfield*, 14 M. & V. 823,—“There was a *prima facie* case by the bond, which the defendant was to answer by shewing an award that was invalid.

The distinction seems to me to be this in debt on award :

The plaintiff need only set out so much of an award as serves his purpose. If the award be to all appearance not mutual, the court will not intend what is set out to be the whole, neither will the court intend other matters in difference. If the award be not final, or void for any other reason, the defendant may shew it by pleading no award, as in *Dresser v. Stansfield*, and by proving the matters which make the award void. When the action is on the submission bond, when the plaintiff replies to the plea of an award, he shews an award good, which will cause a profert of the bond, and he must shew it all; but if he shew a good award without shewing all, the defendant may, as in *Fisher v. Pimbley*, set out the true award, and leave the plaintiff to demur, or traverse its being the true award, or probably he may as in *Foreland v. Marigold*, reiterate his plea of no award, by rejoining no such award, insisting on the variance; though this would not appear to be safe according to *Fisher v. Pimbley*, where the variance was merely caused by omission.

If the defendant set out a different award from the one in the plaintiff's replication, and demurred for causes appearing on the award as shewn by himself, I think they would have no right to insist upon these causes or to take that course of pleading. The court cannot notice, on demurrer, any award but that admitted by the plaintiff. As there is no substantial difference between the award as set out by either party respectively, I take the demurrer to relate to the award as shewn in the replication, and treat the setting out of the award *verbatim*, by the defendant, as surplusage.

The defendant then has demurred, not to the plaintiff's replication, but to the two breaches of the condition of the bond, which are replied to shew non-performance of the award. The objections all go to sustain the plea of no award—that is, to shew the award void—and should, I think, have been contained in a demurrer to the replication.

The defendant commences his objections by stating the matters contained in the condition of the submission bond; then he objects that the fee simple of the land was not a

matter in difference. But the arbitrators are authorized, in the first place, to determine, of, upon, and concerning the possession of the lot of land 31, in the first concession of Hungerford; and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, quarrels, controversies, trespasses, damages, and demands, &c. It is not necessary here to determine whether or not the submission, respecting the possession of the land, included the question decided as to the fee simple, or rather the power of direction to give and direct a deed in fee simple. The words "cause and causes of action," and "bonds," and "demands," are comprehensive enough to include the fee simple of the land in question. It is not for the defendant on demurrer, to object that no question as to the fee simple, or as to a bond for a deed, was a matter in difference: that would be a defence in fact; and the court cannot intend that the deed was not demandable, or the bond for a deed not within the power of the party directed to give it up, or that the not giving the deed or giving up the bond was not a cause of action.—1 Lord Raym. 611; 2 Bing 199; 2 Vent. 242; 3 Taunt. 254; Lord Raym. 247; 5 M. & W. 447; 14 M. & W. 822; 5 M. & W. 50; 16 E. 58.

I shall only notice one of the remaining objections, which as it seems to me is fatal, to the award, and as a consequence to the replication, and to all breaches assigned upon it. The award contains a direction that the plaintiff should pay certain moneys within a month, upon which payment the defendant is directed to give, or cause to be given, a deed in fee simple of the land in dispute, and the defendant is directed not, within the month, to part with the notes given for the land, of which notes he is said to be the holder. Unless these directions can be said to award upon the special and primary matter submitted—namely, the possession of the land—that matter is not decided, and the award must be held bad. Besides, the question of possession being in terms submitted, it appears to have been of importance to the parties to ascertain who was to retain or give up possession within the month, or before the making of the

deed ; or suppose the moneys not paid, who was to give up or retain possession afterwards ? or, supposing the notes parted with, so as to disentitle the defendant to receive the amount due upon them at the end of the month, who then was to retain or give up possession of the land. It appears to me from the award itself, that the submission required the solution of these questions under the submission, before the award could be considered final.—Willis, 268 ; 3 Russ. 494 ; 4 My. & C. 450 ; Dyer 216 (a) ; 1 Hare 276 ; 2 Ad. & El. 752 ; 3 M. & W. 199 ; Willis, 248 ; Cro. Jac. 277 ; 4 B. N. C. 37 ; 16 E. 58 ; 8 Ad. & El. 290.

The award I think is bad ; and the replication is also bad, for this deficiency—the demurrer should not have been to the breaches ; but, nevertheless, we have to look at the whole record, and cannot give judgment in favour of a breach of a void award. The judgment should therefore be for the defendant.

EASTER TERM, 15TH VICTORIA.

DOE DEM WILKES V. BABCOCK.

In an action of ejectment for land, the estate of which is in the crown, where neither party shews any title beyond a short possession : *Held*, that the tenant in possession, if he entered peaceably, and under color of a claiming right, may set up the *jus tertii* as a defence to such action.

This action is brought for a strip of land, two chains in width, adjoining the Grand River Canal on the south, bounded on the north by such canal, on the south by lot No. 2, belonging to the defendant, on the west by the Mohawk road, and on the east by the parsonage or glebe lot. It was formerly in possession of one *Dalton*, who placed the lessor of plaintiff in possession many years ago—eight or more, and he afterwards disposed of a portion of the tract received from *Dalton*, to defendant, now comprising lot No. 2.

About four years ago the canal commissioners declared their intention of taking the tract now in question, for the uses of the canal, but they have not yet arbitrated or paid

therefor, nor have they taken actual possession. The defendant was, according to the evidence, formerly in possession of the west part, and there was some evidence of his possession having been extended to the north-east corner of the east part.

Whether the lots one and two were laid out before or since the commissioners determined to take two additional chains on each side of the canal, is not clear on the evidence. The plaintiff's counsel asserts it to have been done since ; wherefore, No. 2 is bounded on the north by the tract in dispute and does not include it. However, in 1849, the lessor of plaintiff and defendant arbitrated respecting compensation for improvements to be made by defendant to plaintiff for the triangular tract at the north-west corner of No. 2, containing three and a half acres, and a sum was awarded to and paid by defendant to plaintiff. The award and receipt as proved in evidence, are to the following effect :

“ We have valued the improvements on the three and a half acres of land in dispute between Wilkes and Babcock, and find the amount to be paid by Babcock is 8*l.* 15*s.* 0*d.*

“ Brantford, 17th December, 1849. Signed by three arbitrators.

“ Received the amount of the above sum of 8*l.* 15*s.* 0*d.* in full.

(Signed) F. WILKES.

“ Brantford, December 18th, 1849.”

The defendant contended at the trial, that the award embraced the tract in question also, and there was evidence by one of the arbitrators that a fence between the canal and the north limit of this tract was valued. The defendant proved that a surveyor of the Grand River Co. had permitted him to take possession of the east part, and had granted the plaintiff a like privilege as to the west part. The defendant appears to have taken possession of the whole tract without the leave of plaintiff, and has been several years in possession. There was no proof of any forcible or violent act of entry or ouster. It is a part of the Grand River Indian tract ; the estate is in the Queen, and it does not appear to have been ever leased or sold by the Crown or the Indians to any one ; so far as it appears therefore,

Dalton took possession as an intruder upon Crown or Indian lands, and was succeeded by plaintiff, who was dispossessed by defendant. The plaintiff shews a possession for several years prior to defendant; defendant shews a possession for two years or more since, obtained peaceably and held as against plaintiff under a claim of right as having been sold to him by plaintiff, and included in the award.

It was left to the jury to find for defendant if so included, and they found for him.

Plaintiff now moves to set aside this verdict, resting on priority of possession as a good *prima facie* title, denying the tract being sold to defendant or included in the award, and objecting to the defendant's right to set up the *jus tertii*, having himself entered wrongfully, and not under the Queen or the Indians, or by any lawful authority.

MACAULAY, C. J.—The tract of land in question is a part of the Grand River reserve or Indian tract, of which the estate remains in the Crown. The lessor of plaintiff entered some years ago under one *Dalton*, but no license from the Queen or lease or assignment by, or on behalf of the Indians, is shewn to either of them. The lessor of plaintiff afterwards disposed of the tract called lot No. 2, immediately south of the strip in dispute, and which separates it from the canal, to the defendant, and he appears to have afterwards entered into possession of this tract, as well as of the three and a half acres of lot No. 2, under color of the award; he entered, claiming the right as against the lessor of plaintiff, not forcibly, and has been ten years in quiet possession.

Now, although possession is *prima facie* evidence of title, and sufficient as against a mere wrong-doer, shewing no right in himself in trespass *quare clausum fregit*, or was in ejectment, especially if he entered not only wrongfully, but forcibly, still when neither party shews any title beyond a short possession, the defendant in possession, if he entered peaceably under color of a claiming right, may seemingly set up the *jus tertii* as a defence in ejectment, on the ground that the plaintiff was to recover on the strength of his own title.—2 Saund. 111, note; Jayne

v. Price, 5 Taunt. 326; Doe dem. Wilkins v. Marquis of Cleveland, 9 B. & C. 864; Doe dem Harding v. Cooke, 7 Bing. 346; Doe Hughes v. Dyball, 3 C. & P. 610; 1 M. & M. 346, S. C; 1 A. & E. 351; 7 A. & E. 239; Doe dem. Graham et al. v. Penfold, 8 C. & P. 536; Doe dem. Stansbury v. Arkwright, 5 C. & P. 575; Elliott v. Kemp, 7 M. & W. 312; Brest v. Lever, 7 M. & W. 593; as to the effect of an award, see 3 East, 11, and Doe dem. Smith et al. v. Webber, 1 A. & E. 119; Plow. 54 B. & 546; Statute 2 Wm. IV. ch. 13, secs. 3, 6, 7 and 8 at the end; Graham v. Peat, 1 East, 244; Goodtitle v. Baldwin, 11 East, 488; Doe dem. Legh v. Roe, 8 M. & W. 579-80; Kettichan v. Robertson, 2 B. U. C. M. T. 6 Vic.

Had the defendant claimed a right to the possession as against the lessor of the plaintiff, as being included in the assignment of lot No, 2, or in the three and a half acres mentioned in the award, and by virtue of the award respecting the said three and a half acres? The award certainly gives color to his claim, and the jury have found that it actually embraced the tract in question. I am much disposed to think that it might be so fairly intended, seeing that the only reason it was not included as part of No. 2, recently laid out, was because the Grand River Canal Co. intended to take it, which shews that the defendant's tract No 2, was intended to be bounded on the north by the canal reservation; and the fact that the fence on the north side of the strip in dispute, between it and the present canal reservation, was valued by the arbitrators, affords reasonable ground to suppose that it was considered as a portion of the three and a half acres, as the jury have found. Under such circumstances, I apprehend it was open to the defendant to set up the right of the Crown and Indians in destruction of any right on the lessor of plaintiff's part, rested on mere possession for six or eight years before the defendant entered. No good purpose could be served in granting a *rule nisi* without a probability of its being made absolute, and as I do not think such a result would be likely to follow a rule in the present case, I think it better to decline granting it. There was no misdirection, and

it cannot be said that the verdict was not strictly warranted under the evidence.

SULLIVAN, J.—The lessor of the plaintiff in this case founds his right to recover upon the correctness of an abstract proposition, to this effect:—That in the action of ejectment, prior possession is sufficient title, or in all cases sufficient evidence of title against a defendant who sets up or who proves no title in himself. The evidence given at the trial, while it shews that the lessor of the plaintiff had possession of the premises in dispute previous to the defendant, at the same time establishes a fact which is undisputed—namely, that the land in question is a part of the Grand River tract, held by the Crown for the benefit of the Six Nations of Indians, and never ceded, and to which the lessor of the plaintiff can have no right of entry. The utmost length to which the doctrine of prior possession being *prima facie* proof of title in ejectment has been carried, is stated in Williams's note to 2nd Saunders, 111; where he admits it, as it appears to me doubtingly, to be confirmed by modern authorities, to the extent that actual possession, not apparently tortious, will furnish a *prima facie* case for the plaintiff in ejectment against a wrong doer;—citing Doe Hughes v. Dyball, 3 C. & P. 610; Doe Graham v. Penfold, 8 C. & P. 536; Doe dem. Litchfield v. Stacey, 6 C. & P. 139; Doe Smith v. Webber, 1 Ad. & E. 199. In all these cases the prior possession relied upon as presumptive evidence of title, is shewn without any proof of another and better title than could be so presumed. To hold that with the evidence before the court of a title in a stranger, the lessor of the plaintiff could recover, would be at once to overthrow the well established rule, that in ejectment, the lessor of the plaintiff must recover upon the strength of his own title—see Roe v. Harvey, Bever. 2484. Doe Crisp v. Barber, 2 T. R. 749; and such a decision would deprive the defendant of the right to set up a *jus tertii*, which in ejectment he has always been permitted to do. Taking the law to be with the plaintiff to the utmost limit to which any of the cases would carry it, he must fail in the present case; for admitting that prior possession appa-

rently not tortious is evidence of title against a wrong-doer, it is no such evidence in the presence of proof of actual title out of the lessor of the plaintiff.

I am moreover much inclined to doubt, whether at this day, prior possession for a less period than 20 years would be held in England to be *prima facie* evidence of title, even against a wrong-doer; for I can see no difference between the position of a lessor of the plaintiff, who undertakes to establish a right of entry in himself, and the defendant in trespass, who by pleading *liberum tenementum*, a title less than freehold, undertakes to shew right in himself to do the act complained of. In *Brest v. Lever*, 7 M. & W. 593, in an action of trespass *quare clausum fregit*, Baron Parke says: "By the plea of *liberum tenementum*, the defendant admits that the plaintiff is in possession and that he himself is *prima facie* a wrong-doer, and he undertakes to shew a title which shall do away with the presumption arising from the plaintiff's possession. This he must do by shewing title by deed in the usual way, or by proving a possessing title for more than twenty years. But here," says Baron Parke, "the plaintiff has only proved acts of ownership extending over seventeen years, and has not connected them with any previous possession. It amounts therefore to nothing more than a longer against a shorter possession."

Now, the lessor of the plaintiff in ejectment admits the possession of the defendant; he undertakes to do away with the presumption arising from the defendant's possession, and therefore it is, that he must recover upon the strength of his own title. He cannot insist upon a *jus tertii* against the defendant, but the defendant may shew it as against him.

The case of *Jones v. Chapman*, 2 Ex. 803, in the Exchequer Chamber, after a conflict of authorities between the court of Exchequer and the other common law courts, decided that a defendant in trespass *quare clausum fregit*, under the plea of not possessed in the close, not the close of the plaintiff, may prove title in himself, and that a defendant may have done so, before the new rules, under the plea of not guilty. The judgment shews that in the

action of trespass possession is sufficient title against a mere wrong-doer, and the party defending himself must shew a title to justify a trespass upon such a possession. The reason seems to be presumptive in favour of the possession at the time of the act committed, which must be displaced by title. I am unable to draw any line of distinction between a defendant who attempts to justify invasion of the possession of another, and he who seeks to recover that possession at law. It seems to me that they are both bound to shew title according to the authorities I have cited, and which are principally referred to in Williams's note to 2 Saunders, 111; a person put forcibly out of possession by another, may maintain ejectment by proving his prior possession and the eviction. But this does not establish the point that the bare fact of two persons having been in possession, the one prior to the other, will give the former a presumptive title, and far less, that such title, if presumed, cannot be displaced by proof of actual title in a third party, under whom neither the plaintiff nor the defendant trace title.

I have not entered into the question attempted to be raised on the part of the plaintiff, as to a certain *scintilla juris* in the possession of these Indian lands, arising from customs or rules said to be observed by the Crown in giving pre-emption to the possessors, or in directing compensation for improvements before the lands are disposed of to another. This is not the place to dispense the grace and favour of the Crown, and there may be circumstances which would make it highly unjust in particular cases, were any such practice to be elevated into a legal rule, conferring a right. So far as I can see in the present case, the lessor of the plaintiff and the defendant are alike intruders upon the lands of the Queen, and it is not competent for one to assert his wrongful prior possession as a title to enable him to recover another wrongful possession, even against a fellow wrong-doer. I think therefore that the plaintiff's action must fail, and that the verdict given for the defendant should not be disturbed.

McLEAN, J. concurred.

JOHNSTONE V. ODELL.

Trespass—Pleading.

A declaration in trespass stated that before the trespasses, one T. B. O. was seized in fee of the close in which, &c., and in consideration of 125*l.* bargained and sold it to the plaintiff in fee simple, and afterwards died, leaving the defendant his heir-at-law, who at the time when, &c., had no title or color of title to the close, excepting as heir-at-law of the said T. B. O. as aforesaid. The count went on to state that after the death of T. B. O., and while the close remained the close of the plaintiff as above, the defendant broke and entered, &c. The defendant pleaded "not possessed," and that "the close was not the close of the plaintiff." *Held*, on special demurrer, that both the pleas were good.

The declaration also contained a count for an assault and battery, to which the defendant pleaded a prosecution before magistrates for the same assault, in the form given in 3 Chit. Plead. 7th ed. 322-3. The plea described the statute giving the magistrates jurisdiction as passed in the fourth and fifth years of the reign of Queen Victoria. *Held*, upon special demurrer, that the plea was bad for so describing the statute.

Venue, united counties of Wentworth and Halton.

Declaration 28th February, 1851, 1st count recites—that before the time when, &c.—to wit, on the 17th February, 1847—Thomas Bernard Odell was seized in fee of the close afterwards mentioned, and then in consideration of 125*l.* to him paid by the plaintiff by indenture between them respectively, bargained and sold to the plaintiff the said close, to hold, &c., in fee, and afterwards *died*, leaving defendant his heir-at-law, who at the time when, &c., afterwards mentioned, had no title or color of title to the said close, or any part, *except* as aforesaid, and then proceeds—for that defendant (after the happening of the foregoing events, and while the said close remained the close of the plaintiff as above stated, on the 1st March, 1847, *vi et armis*, broke and entered the said close of plaintiff, which is situated in the township of Trafalgar, &c., setting out the butts and bounds; and then *under a false* and unfounded claim and assertion that the said close was the close of defendant, as such heir-at-law as aforesaid, ejected and expelled the said plaintiff and his family from the possession and enjoyment of the said close, and under color of such false claim, &c., kept them out from thence hitherto, whereby plaintiff was deprived of the use and benefit of his said close, and was during all the time hindered and prevented from selling or disposing of the same, or any part thereof. 3rd count—assault and battery. 3rd plea, to 1st count—that plaintiff at

the said time when, &c., was not possessed of the said close in manner and form as he hath in the said 1st count alleged; concluding to the country, &c.

4th plea to 1st count—that the said close in which, &c., was not, at the said time when, &c., the *close of the plaintiff in manner and form* as the plaintiff hath in the said 1st count alleged; concluding to the country. 7th plea to the 3rd count—that it was no more than a common assault and battery within the statute 4 and 5 Vic. c. 27, s. 27; and that after the commission of such trespass—to wit, &c., upon the complaint of plaintiff, before then made by him of the said trespasses, according to the said statute—defendant was brought before J. H. and G. H., two of her Majesty's justices of the peace, and thereupon the said justices did then dismiss the said complaint upon the hearing thereof, on the ground that the said offence was not proved, all of which they forthwith certified, &c.; verification.

Special demurrer to 3rd and 4th pleas. Causes assigned—

1st. Double or multifarious and argumentative, indirectly traversing several matters—viz., the seisin in fee of Thomas Bernard Odell of said close, and the bargain and sale thereof by him to plaintiff, instead of traversing some part thereof directly.

2nd. That defendant endeavors to take issue on a deduction of law from facts stated, instead of on the facts themselves or some of them.

3rd. That it appears conclusively, that defendant is heir-at-law of Thomas B. Odell, and had no claim to the said close otherwise, wherefore he is estopped from denying plaintiff's title in opposition to his ancestor's deed.

To 7th plea, causes assigned—

1st. That it does not allege that plaintiff or any person at any time informed or complained *on oath* to the said justices of the trespass, &c.

2nd. Or that plaintiff authorized or required them to interfere in regard thereof.

3rd. Or that any acts were done necessary to give them jurisdiction.

4th. Or that any hearing was ever had by the said justices, and *within their jurisdiction*.

5th. Or that plaintiff gave, or was required or permitted to give, any evidence or to examine any witnesses relative to the said trespasses.

6th. Or that the said justices received, or required, or considered any testimony relative thereto.

7th. Or did deem the offence not proved, when they dismissed the same, or that plaintiff was present, or required there, when defendant was brought before the said justices, or had *notice* or knew of such proceedings.

8th. That all alleged may have taken place behind the back, without the knowledge and against the will of plaintiff, and may have been a scheme to baffle plaintiff and screen the defendant.

9th. That a statute cannot be passed in the fourth and fifth years of her Majesty's reign, and it does not appear by what parliament the said act was passed.—2 N. S. 98; Chitty, Jr., Forms, 6, notes; Cro. Ja. 224.

Martin, in support of the demurrer, contended, that the third and fourth pleas, denying that the plaintiff was possessed, or that the close was his in manner and form alleged, traversed the title as set out by him, whereas he ought to have traversed such title specially, or in detail. He referred to 2 Chitty's Precedents, (Pearson), 726; Vivian v. Jenkins, 3 A. & E. 741; also, that the 7th plea was bad, as a defence under the 4th and 5th Vic. c. 27, s. 27—the proceedings not appearing to have been had upon the complaint of the plaintiff, praying the justices to proceed summarily, &c. That his presence at the hearing is not averred, nor his absence (if not present) accounted for—Tunncliffe v. Tedd, 5 C. B. 553; 17 L. J. Mag. Car. 67; 2 Moo. & Rob. 446; Regina v. Robinson, 12 A. & E. 672; Skuse v. Davis, 10 A. & E. 635; Long v. Maxwell, Q. B. U. C.; also, that the act was wrongly described as made in two years of her Majesty's reign instead of one—Gibbs v. Pike, 8 M. & W. 225; Huron District Council v. London District Council, 4 U. C. Q. B. R. 302.

Jarvis, for defendant, contended that the seventh plea was good, shewing as it did, that the defendant set the law in motion, and that he must be intended to have followed up the proceedings as he should have done, and that it is framed according to the usual precedents in like cases; referring to 3 Chitty's Plg. 5th ed. 1073; 6th ed. 980, and Chy. Jr. Forms, 730. As to the third and fourth pleas, that the title set out by the plaintiff is immaterial inducement, contrary to the established form of declaring, and not traversable—that a traverse would have been demurrable—that the declaration in substance begins at the words "for that," and that being a possessory action, the possession implied in terming it the plaintiff's close is sufficient title against defendant, who is treated as a trespasser: wherefore it was competent to the defendant to deny, first, the possession thus impliedly alleged; and secondly, that the close was the plaintiff's, as is actually alleged; that such pleas did not oblige the plaintiff to prove title as unnecessarily stated, and that possession would be *prima facie* sufficient against defendant so long as he appeared to be a mere wrong-doer.

That the inducement is mere evidence of title, proper to be proved in reply, if the defendant, under the pleas demurred to, could and did set up title in himself inconsistent with the plaintiff's possession, although the plaintiff might in the first instance support his possession by proof of title, in anticipation of such a defence.—*Jones v. Chapman*, 2 Ex. R. 803; *Bracegirdle v. Orford et al.*, 2 M. & S. 77.

MACAULAY, C. J.—As to the third and fourth pleas, the case of *Willamore v. Bamford*, 2 Bal. 288, is in point to shew that the plaintiff should not make title in the declaration. In that case, in trespass for taking the plaintiff's hay, the declaration stated it was hay for tithe, belonging to his farmer, and it was held the plaintiff need not make any title in an action of trespass, the same being a possessory action, and that doing so was more than he needed to have done, and was but surplusage. Whether if made the plaintiff is bound to pursue it, seems questioned in one part of the case and denied in another.—1 Chitty's Plg. 365;

1 Chitty's Plg. 7th ed. 377 ; 1 Chitty's Plg. 392. It is a well settled rule, that immaterial inducement need not be traversed—Steph. Plg. 275-6-7 ; B. N. P. 93 ; 2 Saund. 63 ; nor what is prematurely alleged—Tys. Plg. 36, 178 ; Hollis v. Palmer, 2 Bing. N. S. 718, (per Bosanquet, J.) ; 3 Scott, 265 S. C. ; Harvey v. Reynolds, Latch 200 ; Aleberry v. Walby, 1 Stra. 230-31. 2nd exception—Sir Ralph Booy's case, 1 Vent. 217 ; Webster v. Watts, 11 Q. B. 317.

The plaintiff does not plead the conveyance according to its legal effect, but merely that Thomas B. Odell being seized in fee, by indenture for valuable consideration, bargained and sold the land to plaintiff. He did not aver that he thereby became seized, which might imply occupation—Stott v. Stott et al., 16 East, 351 ; 2 Ex. R. 813 ; England v. Wall, 10 M. & W. 699 ; or that he continued so seized, except by implication ; or that he entered into possession, without which he could not be entitled to bring an action of trespass *quare clausum fregit* against the bargainor continuing in possession, or his heir-at-law entering as upon a descent cast.—Ayr's Rep. 6.

That entry should be pleaded, for that by the Statute of Uses is insufficient without it, and that by virtue of the deed of bargain of sale he was seized in fee, &c.—Green v. Wallioner or Wiseman, Ayr's Rep. 73 ; Greary v. Brearcroft, Carter, 66. Bargainee cannot maintain trespass before entry, though he may surrender, assign, or release. A conveyance by bargain and sale, actual entry ought to be pleaded, and that possession per 27 H. VIII. *de usibus* is not sufficient.—Platt on Contracts, 23. A lease by bargain and sale under the Statute of Uses, cannot maintain trespass till entry—Latwich v. Milton, Cro. Ja. 604 ; Barker v. Keat, 2 Mod. 249-51 ; Cameron's Digest, Bargain and Sale, B. 12, and Pl. e. 34 ; 1 Vent. 361 ; Cro. El. 46 ; see however, Cornish on Leases, 130 and 131 ; 2 Saund 11 D. (18), referring to note 15 and 1 Saund. 285, (2) ; Strode v. Byrt. 4 Mod. 424. First and second points, Cocknill v. Armstrong, Willis, 99 ; Crowther v. Oldfield, 2 Ld. R. 1230 ; 1 Sal. 346 S. C. ; 1 Saund. 346 (2) ; Tyr. Plg. 105, 473. That the plea of not guilty does not either traverse or admit

immaterial inducement.—*Baine v. Alderson*, 4 Bing. N. S. 402; *Jones v. Chapman*, 2 Ex. R. 803. That under the fourth plea, defendant may shew lawful right to the close in himself or some one under whom he claims to have acted.—*Harvey v. Bridges*, 1 Ex. R. 261; *Perry v. Fitzhowe*, 8 Q. B. 758; *Ryan v. Clarke*, 13 In. 1000; 14 Jurist, 396. As to the plea of *lib. ten.*, see *Heath v. Milnard*, 2 Bing. N. S. 98. As to the conclusion of the pleas to the country, see *Fleming v. Cooper*, 5 A. & E. 221.

The declaration in setting out title in the plaintiff gives no color to the defendant, but treats him as a wrong-doer, unless it is to be understood as admitting that the plaintiff never made actual entry, but that the defendant's ancestor continued possessed until he died, when the defendant entered, and which formed the trespass complained of, in which case the declaration would be bad, as shewing no possession in the plaintiff entitling him to maintain trespass.

The plaintiff merely states a title under which he might have entered, and which would have given him seizin in fee in possession under the Statute of Uses, if the bargainor had relinquished or discontinued possession, which is not alleged. It is consistent with all stated that he continued in actual possession till he died. Having thus set out, or recited his alleged title by way of inducement, the declaration proceeds to charge the defendant with a wrongful entry, *vi et armis*, upon the said close of the plaintiff, and while it remained his close as above stated—that is, his close by virtue of a deed of bargain and sale, without any allegation of entry or actual possession previous to defendant's entry, &c., under a false claim of right—meaning, as heir-at-law of the bargainor. It then alleges an expulsion of plaintiff and his family, which is a matter of aggravation—14 Ju. 396; and among other cases, *Carth.* 280; 2 W. B. 1165; *Taylor v. Cole*, 3 T. R. 292; 1 H. B. 555; but at the same time impliedly asserts actual possession at that time.

Assuming the declaration to be good, and impliedly alleging possession in plaintiff at the time when, &c., he cannot compel the defendant to take issue upon his title so

unnecessarily set forth, or abridge him of his right to deny the plaintiff's possession, or to set up title in himself or some third person under whom he entered. Had the defendant traversed the seizin in fee of T. B. Odell, or the deed to plaintiff, his plea would have been demurrable as putting in issue immaterial matter.

If he could traverse the whole in one plea, it is done by the pleas demurred to; if not, the defendant had a right to deny possession, or that the close was plaintiff's as alleged.—Arch. Plg. & Ev. 234–5, 179–80.

That a traverse should be not only of a material fact but of the most material fact, or one of several equally material of the adversary's pleadings, and which on issue joined will determinē the matter one way or other.—1 Saund. 22, (2); 2 Saund. 5, 28.

I do not find that the words "*in manner and form*," as used, should be construed as relating to anything alleged not material to have been alleged. It only obliges the party to prove substantially the material averments thus traversed in the manner and form alleged—not to prove immaterial averments that may be rejected as surplusage, as all that is stated respecting the plaintiff's title to the close might be including the reference thereto after the words "for that" beginning with "after the happening," &c. without trusting the declaration which would be equally good without such allegations.—Arch. Plg. 211; Stephen's Plg. 129–20, and notes; Stephen's Plg. 467; Bristow v. Wright, Doug. 667; Weathrell v. Howard, 3 Bing. 135; 1 T. & G. 485; The Marmora Co. v. Boswell, 1 U. C. C. P. 191; Robinson v. Rayley, 1 Bur. 316.

The effect of the pleas, I think, is to compel the plaintiff to prove possession in the first instance. If their effect is to require proof of such possession under the title he alleges, and therefore to pursue such title, I do not see that it vitiates the pleas in that light; it may be that they would at a trial, be held to admit the title, and yet require the plaintiff to shew possession under it; and it looks as if the plaintiff by setting out a title, or the evidence thereof entitling him to possession, wishes to make the assertion

of possession, or to preclude the defendant from denying it by compelling him to answer the title he so sets out. This he cannot do, but the defendant may deny the gist of the action as respects plaintiff's title to maintain it—namely, his possession, or that the close was his *modo et forma*—whatever onus of proof such pleas may impose on the plaintiff. If more than usual, it arises from his declaration deviating from the established forms, which ought to be adhered to.—Stephen's Plg. 431; Dyster v. Battye, 3 B. & A. 448. If therefore the pleas traverse and put in issue the averments contained in the inducement, as well as the possession as constituting several links in one connected chain of title, they are good—if not, they are nevertheless good, because they do traverse that part of the alleged title which is material—that is, possession, and that the close was plaintiff's so far as is incumbent upon him to prove possession, and that the close was his close as against a wrongdoer. Having done that—the trespass on defendant's part would be an issue under the plea of not guilty, and would also require proof.—See also, Wheeler v. Montefiore et al. 2 Q. B. 133. As to the seventh plea, it certainly is similar to the one as stated in Tunncliffe v. Tedd, 5 C. B. 553, and in 17 L. J. 679, and in the Forms in 3 Chitty's Plg., 7th Ed. 322–3; Skuse v. Davis, 10 A. & E. 635; 2 P. & D. 550, S. C., which is also applicable to the point of jurisdiction.—Regina v. Robinson, 12 A. & E. 672; 2 Moo. & Rob. 446.

The first case shews that if the plaintiff complained and instituted the procedure under the act, he could not recede or relinquish the proceedings. It is alleged that he did complain. I do not find that such complaint should be *alleged* to have been on oath; and it was his duty to have followed up the proceedings. The last ground of special demurrer, seems, however, a good one, according to Gibbs v. Pike. 8 M. & W. 225, and 4 U. C. R. 96, 302.

McLEAN, J.—The plaintiff has adopted an unusual course in setting out a particular title in himself for the *locus in quo*, and the claim of the defendant for the same premises as heir-at-law of the party from whom such title is alleged to be derived; and he then alleges a specific trespass by the

defendant in breaking and entering his close and expelling him and his family, and keeping them expelled from the premises; and though the whole substance of the count is the alleged trespass, he seems to imagine that the defendant is bound to take issue on each of the several matters stated in the recital, as well as on the trespass; and that, because a particular title is set up as derived by deed from the same party under whom, as the plaintiff says, the defendant claims as heir-at-law, the defendant is estopped from denying plaintiff's title. Now, if the whole of the recital or inducement which refers to plaintiff's title were struck out of the count, there would still remain a sufficient cause of action against the defendant, for the plaintiff alleges that he broke and entered the close of the plaintiff, which is situate in the township of Trafalgar, &c., and ejected and expelled the plaintiff and his family from the possession and enjoyment of the said close, and kept them so expelled for a long time, &c. The declaration alleges that defendant broke and entered under a false and unfounded claim and assertion that the close was the close of the defendant as heir-at-law, but that statement cannot make the breaking and entering any greater or less trespass than it otherwise would be, and the defendant cannot be called upon to answer it. The facts as to the title may all be precisely as the plaintiff has alleged, and yet the plaintiff may not have been in possession so as to have enabled him to maintain trespass. The actual possession and occupation may have been in a tenant or in a stranger, and if so, the defendant could not be bound to admit the plaintiff's possession, because he chose to disclose a certain title, which as against the defendant, if truly set out and well founded, might entitle the plaintiff to the possession.

It appears to me that the defendant cannot be estopped by anything contained in this count, from denying the possession or property of the plaintiff in the premises, so as to entitle him to maintain trespass, and that the demurrer as to these pleas must fail.

To the count for assault and battery, the defendant pleads that after the commission of such trespass, the defendant

was brought before James Huson, Esq., and Gabriel Hopkins, Esq., then being justices of the peace, to hear and determine divers misdemeanors committed in the county of Halton, *upon the complaint of the plaintiff*, before then *made by him* of the said trespass, according to the statute passed in the fourth and fifth years of the reign of our Sovereign Lady Queen Victoria, entitled "An act for consolidating and amending the statutes in this province relative to offences against the person," (fourth and fifth Vic. c. 27, secs. 27 and 28); and thereupon the said justices did then dismiss the said *complaint upon the hearing thereof, on the ground that the said offence was not proved*. The plea then alleges the giving a certificate under the act, by the justices of the peace, which is still in full force and effect, whereby, and by force of the statute, the defendant then became and still is released from the said action.

To this plea the defendant demurs—alleging for cause, that the plea does not allege in the distinct and certain manner required by the rules of pleading, that the plaintiff or any person, at any time, laid any information *on oath*, or made any complaint *on oath* to the *justices* in the plea mentioned as such justices, against the defendant, concerning the trespasses in the plea mentioned, or that the plaintiff required or authorized them to interfere in regard thereof, nor that any act was done, necessary to give to the said justices jurisdiction over the said trespasses, nor that any *hearing* was ever had by the said justices or any of them, as such, within their jurisdiction, of, or relating to the said trespasses, nor that plaintiff was required to give, or did give, or was permitted to give any evidence relating to the said trespasses—nor that the justices received, or required, or considered any testimony relating to the same—nor that the justices or any of them did *deem the offence not proved*, when they *dismissed* the same—nor that plaintiff was present at any time when the defendant was brought before the said justices, or had notice of any proceedings being commenced or pending. Also, that notwithstanding anything stated in the plea, the *transactions mentioned* may have been a *scheme contrived* by the justices and the defendant, behind

the plaintiff's back, and without his knowledge, to baffle the plaintiff, and screen the defendant from justice.

Also, that there cannot be a statute passed in the fourth and fifth years of the reign of our Sovereign Lady Queen Victoria, and that it does not appear by what parliament the said supposed act was passed.

This plea of the defendant, to which the plaintiff demurs on so many grounds, is taken apparently from Chitty's Forms, page 1073, and is precisely the same as that in the case of *Tunnicliffe v. Tedd*, 5 Com. Bench, in which Williams, J., says, that the plea discloses a good bar to the action.

The plea in this case, shews that the defendant was brought before two justices of the peace, on a complaint before them made by the plaintiff, of the said trespasses according to the statute, and that the said justices, *upon the hearing of the said complaint*, did dismiss the same, on the ground that the said offence was not proved; and then it sets forth the giving of a certificate under the statute, which operates as a release from this action.

By the act passed in the session of parliament fourth and fifth Vic. ch. 27, sec. 27, jurisdiction is given to any justice of the peace upon complaint of the party aggrieved, to hear and determine assaults and batteries, and to impose fines and imprison in case of conviction, but it also gives power to the justice, upon hearing any such case of assault or battery, if he shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, to dismiss the complaint, and forthwith to make out a certificate under his hand, stating the facts of such dismissal, and to deliver the same to the party against whom the complaint was preferred. Then the 28th section declares that such certificate shall be a bar to any other proceedings, civil or criminal, for the same cause.

The plea appears to me to set forth the facts of the proceedings before the magistrate under this statute, and the granting of a certificate by them, which bars the plaintiff's action, and in my opinion all the grounds of special

demurrer fails, unless indeed the objection which relates to the statute being alleged to have been passed in the fourth and fifth years of the reign of our Sovereign Lady the Queen. In the case of the Huron District Council v. The London District Council, 4 U. C. Reports, 303, that objection was held good on general demurrer, and it must hold equally in this case, unless the title of the statute being particularly set out, is sufficient to relieve the plea from any uncertainty.

The more correct way certainly, would have been to state the statute as having been passed in the fifth year of her Majesty's reign, or at a session of parliament held in the fourth and fifth years of her reign. The case of Gibbs v. Pike, 8 M. & W. 227, is exactly like the present, and there it was held to be a fatal objection to describe a statute as made and passed in the first and second years of the reign of her Majesty Queen Victoria. On the authority of that case, and the case in our own court of Queen's Bench, I suppose effect must be given to that ground of demurrer, and the defendant must, if he desire it, have leave to amend.

SULLIVAN, J. concurred.

THE QUEEN V. HALL.

In an action on a bond made by A. to the Queen, as surety to B., who was appointed treasurer of the Western district, under the statute 4 and 5 Vic. ch. 10, sec. 20, and continued in office under that statute until he was re-appointed treasurer by the municipal council under the statute of 9 Vic. ch. 40, sections 7 and 8, which altered the mode of electing such treasurer: *Held*, that A. was not liable for any defalcations made by B. after his re-election by the municipal council under the statute 9 Vic. ch. 40, secs. 7 & 8, and that the bond given by A. ceased to be a security for any thing done after that period.

Scire facias quare excutionem non, upon a bond made by defendant to her Majesty on the 14th February, 1842, in the sum of 500*l*.

On oyer, after reciting that J. B. Baby, (therein mentioned) as treasurer of the Western district, had been required, pursuant to the statute 4 and 5 Vic. ch. 10, to give security for the due performance of his office, by entering into a bond with sufficient sureties, &c., the condition was, that if the said J. B. Baby should well and faithfully fulfil,

perform and discharge all the duties and services, which by him as such treasurer ought to be fulfilled and performed, and should keep and render just and true accounts of all moneys which he should receive, or which in anywise might come into his hands, or under his power and control as such treasurer as aforesaid, and should from time to time and at all times, pay such sum and sums according to the provisions of any law or by-law then or thereafter to be in force, to the several persons entitled thereto, &c., then, &c.

Defendant pleaded—1st, that the said J. B. Baby remained and continued as such treasurer from the making of the said bond unto the 10th of October, 1846, and no longer, and during all that time which he so remained and continued such treasurer, he performed the said condition in all things, &c.

The *Attorney General*, in reply—That the said J. B. Baby did remain and continue treasurer of the then Western District much longer than unto and upon the said 10th October aforesaid—to wit, until the first of November, 1849, concluding to the country. And as to the plea of performance, assigns for breach before the 10th October, 1846, the receipt of divers sums of money, &c., under the act for the erection of a Lunatic Asylum, which ought to have been paid to the Receiver General, but were not, &c.

To which the defendant rejoined payment, concluding to the country and issue.

At the trial, before Mr. Justice Burns, at the last assizes in and for the county of York, it was admitted—

That J. B. Baby was treasurer of the Western District, from the making of the bond until the first of September, 1849. That between the first of August, 1845, and the first of January, 1846, he received Lunatic Asylum rates for the year 1845, to the amount of 107*l.* 2*s.* 7½*d.*, and also for balance of like rates for the previous year, 34*l.* 16*s.*, together equal to 141*l.* 8*s.* 7½*d.*, which (deducting per centage,) was paid over to the Receiver General previous to March, 1846; that between first March, 1846, and first October, 1846, he received the further sum of 88*l.* for like rates, for assessments in the year 1845; that between first

October, 1846, and first September, 1849, he received like rates to the amount of 533*l.* 15*s.* 0*d.*, exclusive of per centage, which has not been paid to the Receiver General, nor any part thereof by him ; that the replications relate to such moneys ; that in October, 1846, said Baby was by the district council re-appointed or continued treasurer under the statute 9 Vic. ch. 40, sec. 7, and that he did not then, or at any time since, give any new bond or other security to the Queen, or to any department of the government.

The bond in suit was taken under the provincial statute 4 and 5 Vic. ch. 10, sec. 29.

For defendant it was objected—

1st. That his principal did not continue treasurer to first September, 1849, because the provincial statute 9 Vic. ch. 40, secs. 7 and 8, altered the mode of appointment of treasurer, and that defendant's bond ceased to be a security for anything done after such appointment.

The case proceeded, and a copy of the new security given by defendant's principal to the district council, was put in. A bond from him, and two sureties to the district council of the Western District in 2000*l.* and 1000*l.*, respectively dated 9th October, 1846, conditioned that if said J. B. Baby should well and faithfully keep, and lawful application make of all moneys which might come into his hands by virtue of any enactment of the legislature of the late province of Upper Canada, or the legislature of the province of Canada, or of any by-laws of the municipal or district council ; then, &c.

The present defendant is one of the sureties in this bond also. Also, a receipt of G. Bullock, treasurer, for 117*l.* on account of, and 9*s.* 6½*d.* for the balance due on Lunatic Asylum rates up to the 31st of January, 1850. Also a general release to said J. B. Baby, under the hand of the warden and seal of the united counties of Essex, Kent and Lambton, but in the name of the warden, on behalf of the said municipal council in consideration of 1000*l.*, excepting a confession of judgment for 1000*l.*, which is the real consideration for the release—dated 8th October, 1850.

In Easter Term, 14 Vic., *Vidal*, for defendant, obtained a

rule calling on the Queen and Attorney General to shew cause why the verdict should not be reduced to 88*l.*, or why the verdict for the plaintiff on the 1st issue for 583*l.* should not be set aside and a verdict be entered for the defendant on the points reserved at the trial—viz. : whether the bond on which the *sci. fa.* is founded did not become void on the 10th of October, 1846, by the appointment of said J. B. Baby as treasurer on that date, under the 9th Vic. ch. 40, sec. 7, by the municipal council of the Western District, and his giving a bond for the due performance of his office to the said council, and that it was his duty to, and he did pay to the credit of the Western District all moneys received by him for Lunatic Asylum rates, from said 10th October, 1846, to the time he left the office of treasurer.

MACAULAY, C. J.—The question is, whether the defendant, having become surety by a bond to the Queen for Mr. Baby, as treasurer of the Western District, under the statute 4 and 5, Vic. ch. 10, secs. 29 and 30, continued liable for moneys received by his principal, who continued treasurer under that statute until he was appointed treasurer by the municipal council under the statute 9 Vic. ch. 40, secs. 7, 8.

The statute 4 and 5 Vic. ch. 10, sec. 29, vacated the office of treasurer previously appointed by the justices of the peace under former acts, and authorized the Governor to appoint a treasurer in each district, under the great seal to hold during pleasure ; such appointment to be made, after the person named by the Governor should have first given good and sufficient security for the due execution of the office of treasurer, and for the faithful accounting of all moneys which might come into his hands by virtue of the said office. Section 30 made it his duty to receive all moneys raised under any by-law of the district council, and all moneys which, under any act of competent legislative authority, should be directed to be paid to or received by him, and to apply and account for the same as prescribed by such by-law, or act of legislative authority, &c.

4 and 5 Vic. chap. 91, regulates the taking of securities from all officers entrusted with the receipt of public moneys. The statute 9 Vic. c. 10, sec. 7, passed the 9th

June, 1846, enacted that at the first meeting of the district municipal council, after the passing of that act, a district treasurer should be selected by a majority of the votes, notwithstanding the 29th section of 4 and 5 Vic. ch. 10, and should be subject to re-election every three years; who should have all rights and powers which by any enactment then in force might appertain to any district treasurer appointed before the passing thereof, not inconsistent with that act. By section 8, any treasurer selected by the provisions of that act, before he entered on the duty of the said office, should give security for the safe keeping and lawful application of all moneys which might come into his hands, by virtue of any enactment of the legislature of Upper Canada or of the province of Canada, or of any by-laws of the municipal or district council, and that such security should be, the treasurer in 2000*l.*, and two sureties in 1000*l.* each, to be approved of by the district council.

It does not state *to whom* the bond is to be given, (*vide* 12 Vic. ch. 81, sec. 171, and 13 and 14 Vic. ch. 67, s. 60.)

It appears that upon the same individual who was treasurer under the 4th and 5th Vic. ch. 10, sec. 29, and had continued such until the meeting of the district council under 9 Vic. chap. 40, sec. 7, being appointed by such council, he gave security by bond in 2000*l.*, with two sureties in 1000*l.* each, dated 9th October, 1846, to such district council. The defendant being security in that, as well as on the bond on which this *sci. fa.* is brought.

Perhaps the bond lastly given, ought to have been made to the Queen, and if it had, I apprehend it would have superseded the former, and as it is, would seem to amount to the same thing.

The plea is not perhaps well framed to meet the point of the defence, because the defendant's principal did in fact continue to be treasurer after the 10th October, 1846, though not under the same appointment, but an independent and new one. The question desired to be raised is, whether he so continued in relation to the binding effect of this bond upon him and his sureties. The last appointment superseded the former, and he thereupon ceased to be

treasurer under the commission granted by the Governor under the 4 and 5 Vic. ch. 10, sec. 29, and became such, under the selection of the municipal council. The appointment of the Governor during pleasure ceased when he had no longer power to continue it, and another duly authorized power appointed to the office.

The sureties under the last bond would not be liable after a re-election of their principal by the district council at the end of three years.

On reference to the cases cited and others, I must say, I feel bound to hold the defendant not liable after the 10th October, 1846; consequently, that the only defalcation he is bound to make good is the 88*l.* in arrear at that period. The position of his principal, and indeed his own position, was altered, and the treasurer became accountable to another party under another appointment.—*Farr v. Hollis*, 9 B. & C. 315.

It is not contended that a bond to the Queen being a *quasi* record makes any difference, or that any exists between the Queen and subject. Nothing has been rested on any peculiar ground arising from the prerogative of the sovereign as distinguished from a subject, and I am not aware that any exists, taking the question of discharge or exoneration of a surety, under the circumstances relied upon in this case.

McLEAN, J.—On the trial of this cause, certain admissions were put in. The bond was given under the Municipal Corporation Act, 4th and 5th Vic. ch. 10, sec. 29, which took away from the justices of the peace in the several districts, the power of electing the district treasurers, and declared that all previous appointments of treasurers should be vacated from and after the first of January, 1842, from which period the power of appointment was vested in the Governor of the province, and the offices were to be held during pleasure, by an instrument to be issued under the great seal, after security given for the due performance of the duties. The four following sections prescribe the duties of treasurers and their emoluments.

The act 9th Vic. ch. 40, sec. 7 conferred on the several

district councils the power of appointing the treasurers, and the 8th section prescribes the amount of security to be given for the safe keeping and the lawful application of *all moneys which may come into their hands by virtue of any enactment* of the legislature of the late province of Upper Canada, or of any by-laws of the municipal or district council. The security to be by such treasurer in 2000*l.*, and two sufficient sureties to be approved of by the district council in the sum of 1000*l.* each.

A bond of the defendant, dated 9th October, 1846, with the same persons as sureties as in the former bond to the Queen, was put in by the defendant; and it appeared in evidence that Mr. J. B. Baby was appointed treasurer under the act of 1846, on the 10th October, 1846, and re-appointed on the 10th October, 1849, and continued to act as treasurer until January, 1850. It was proved that of the moneys collected for lunatic asylum rates prior to October, 1846, a sum of 88*l.* was still unpaid, and that a much larger amount received while J. B. Baby was in office as treasurer after that period, had not been paid over or accounted for to the Receiver General. The question then is, whether the defendant is liable on his bond to the Queen for moneys so received by the treasurer under his appointment by the district council. The defendant now moves, pursuant to leave reserved at the trial, to reduce the verdict to the sum of 88*l.* and to set aside the verdict for the Crown and enter a verdict for the defendant on various grounds taken at the trial. Mr. J. B. Baby continued to act as treasurer under his appointment from the Governor till the 10th October, 1846, he then ceased to be under the control or subject to removal by the Governor. He was on that day elected treasurer by the district council, and gave in bonds in a larger penalty than had been required by the Government, for the safe keeping and lawful application of *all moneys which might come into his hands by virtue of any enactment of the Legislature of Upper Canada*, or of any by-laws of the municipal or district council. The statute of 1846 does not prescribe any security to be given to the Queen, for moneys to be received by treasurers for lunatic asylum

or other provincial purposes ; and, from the tenor of the clause in that act, requiring the security to be given and prescribing the amount, it appears to have been the intention of the legislature that the securities to be given by treasurers to the district councils should cover all moneys whatever to be received by them, whether provincial or local. The treasurer and his sureties entered into a bond to the council for the safe keeping and proper application of *all* moneys under the statute, and being responsible under such bond to the council, they could not be accountable to the Queen for the *same* moneys under a bond previously given.

This case differs materially from the case of Augero v. Keen et al., executors of George Keen deceased, 1 M. & W. 390. In the first place the appointment of Mr. J. B. Baby in 1846, by the district council was not a re-appointment to office ; it was the first appointment made by the council, and though the fact of the office having been previously held by the same party, may have influenced the council to continue him in the office, it was made independently and without reference to the former appointment by the Governor. But, even if it could be regarded as a re-appointment, the bond was not, as in the case referred to, to secure all moneys received by virtue of the appointment from the Governor, or of any re-appointment to the office of treasurer. The recital shews that the bond was required under the statute 4 and 5 Vic. chap. 10, and was to be in force so long as J. B. Baby, continued as *such* treasurer, liable to be removed at the pleasure of the Governor. The defendant might be quite willing to be the security of a person appointed treasurer under such restrictions, but he might be unwilling and could not be called upon to extend his security farther in behalf of the same person, because such person happened to be chosen to fill the same office by a totally different authority.

The case of Bamford et al. v. Joseph Isles et al., 3 Ex. 380, shews that the sureties of a person elected from year to year, cannot be held responsible for a longer period than one year, though continued in office by annual elec-

tions for many years, and though the terms of the bond were for the due performance of duties "thenceforth from time to time, and at all times, so long as the principal should continue in such office." Parke, Baron, in that case says, "If the condition of the bond had contained the words," or of any re-appointment thereto, as in *Augero v. Keen*, there would have been an end of the difficulty; and Pollock, Ch. B., says, "if a party be re-appointed on different terms, that is a revocation of his former appointment." In this case however, the former appointment was revoked by the statute, and by the act of the district council under it on the 10th October, 1846, and the principal and his sureties can only be responsible under their bond, for moneys received up to that period. The issue as to the receipt and payment of moneys under the first appointment, seems to be confined to the period during which the treasurer held that appointment, and as a certain amount was found to be due for that period, that issue is properly found for the crown. With respect to the other issue, as to the continuance in office by the treasurer for a period longer than from his appointment up to 10th October, 1846, it appears to me that it should have been found for the defendant, and that a verdict should now be entered for him on that issue, if leave has been reserved for that purpose.

SULLIVAN, J. concurred.

PARK V. TAYLOR.

Effect of Interpleader order.

In an action of trespass against the plaintiff in a writ of *fi. fa.* for taking &c., the goods of the present plaintiff, the defendant pleaded that he had committed the trespass in aid of the sheriff's officer acting under the writ, and at his request, in the execution of the same, and then shewed an interpleader order of the judge of the County Court out of which the *fi. fa.* had issued, by which the present plaintiff, who had claimed the goods when seized under the *fi. fa.*, was barred from prosecuting any claim to the goods against the sheriff or his officer, or against any person acting under or in aid of them.

Held, that the order, though valid, so far as respecting the sheriff and his officer, could not be a protection to the executor's debtor.

The substance of this case as stated is, that the defendant had a *fi. fa.* issued out of the Midland District Court

against the goods of one John C. Park, directed to the sheriff of the Midland District, who under a warrant for the execution thereof, to William Lowe his bailiff, by virtue whereof the said Lowe, together with defendant, who at the request of Lowe acted under him in the premises, and in his aid seized and took, &c., the goods and chattels, for which this action is brought, as the goods of the said John C. Park.

That the plaintiff claimed such goods, whereupon the said sheriff applied to the judge of the county court of the united counties of Frontenac, Lennox, and Addington, on the 26th March, 1850, who summōned the defendant and plaintiff to appear before him at chambers in the city of Kingston on a day appointed, to state the nature and particulars of their claims to the said goods, &c.

That the said sheriff and defendant appeared upon the return of such summons, but the plaintiff made default; whereupon the said judge ordered that the said plaintiff should be forever barred from prosecuting his claim against the said sheriff and the said Lowe his officer, and all persons acting under and in aid of the said sheriff or officer, saving nevertheless the plaintiff's right and claim against all and every other person and persons whomsoever, excepting the said sheriff, Lowe, and the said persons acting under and in aid as aforesaid, as by the record and proceedings thereof remaining in the said court fully appears, which order is in full force.

McKenzie, for the demurrer, abandoned the objection that an interpleader order made in vacation was void—statute 7 Vic. ch. 30, sec. 6, and 9 Vic. ch. 56, sec. 4; but he contended that the words "*hereinbefore contained*," in the latter part of the 6th section of 7 Vic. ch. 30, only extended to warrant relief in favor of the sheriff or officer properly so called, and not mere assistants; at all events, that by force of the saving in the latter part of the 3rd sec. the right or claim of a third party against the plaintiff in the writ of *fi. fa.* could not be contended, nor could the judge finally determine between them without their mutual consent, as provided for in the latter part of the 1st section.

He referred to statute 21 J. I, ch. 12, sec. 5, as shewing that when assistants were to be protected, they were mentioned ; at any rate, that the present defendant having been plaintiff in the writ, could not by acting in aid of the sheriff's bailiff in executing his own writ, escape responsibility to the plaintiff, and take refuge under the interpleader order ; and that the order, so far as it applied to the defendant, was void.—3 Dow. 137 ; 4 Dow. 605. Also, that it should be averred to have been entered of record.

Macdonald, Q. C., contended, in favour of defendant, that while the order subsisted, it was a protection to all embraced within its terms, and that the demurrer admits the defendant to have acted in aid of the sheriff or officer. That the act in its equity, extends to aiders and assistants of sheriffs or officers with whom they are identified, and under whom they are equally entitled to protection ; and that until revoked, the order protects all such assistants, not containing any exceptions, and is sufficiently averred to be of record. That by not appearing, the plaintiff virtually abandoned his claim and tacitly assented to the order going, without opposition ; and that on the pleadings, defendant appeared to have acted merely in aid of Lowe, and not as plaintiff in the writ.—4 Dow. 605 ; 1 Dow. 59, 292.

MACAULAY, C. J.—It may be a question whether the proper course is not to move to stay proceedings, when actions are brought in violation of the protection afforded by such orders as the one in question, when there is no dispute touching the identity of the goods, &c., or the right of the parties to be protected under them. The defence may, however, I should suppose, be pleaded, when a question of fact or law is to be raised for decision.

The order seems to be valid so far as respects the sheriff and Lowe, but to construe it as extending to and protecting the plaintiff in the writ, though he did act in aid of the officer, would be to contravene the saving of the act. He is excepted upon the principle, that being his writ, he is responsible for the acts of the officer, if done at his instance or with his concurrence, or if he afterwards adopt or approve of it ; and the very maintaining of his claim on the return

of the summons, indicating a readiness to become a party to an interpleader suit, had the plaintiff appeared and an issue been ordered, shews that he stood in the position of a responsible principal, and not of a mere assistant. Had he refrained from appearing or supporting his claim, it would have been another thing; in that event he would have been barred and the goods restored to the plaintiff, or the sheriff been authorized to abandon the seizure, but he did not pursue that course; on the contrary, he persevered in seeking to maintain the seizure, in which he had assisted, and for his own benefit as plaintiff in the writ.—2 N. & M. 662; 4 Ty. 157; 4 N. & M. 852; 5 Dow. 381; 2 Dow. 59, 222-92; Lewis v. Jones, 2 M. & W. 203; Abbott v. Richards, 15 M. & W. 194; Hollier v. Laurie et al., 3 C. B. 334.

A plaintiff in a *fi. fa.* against goods, is liable to the owner of goods wrongfully seized by the sheriff or officer, if present attending the officer.—Meredith v. Flaxman, 5 C. & P. 99; Robinson v. Vaughton, 8 C. & P. 252; Jarmain v. Hooper et al., 6 M. & G. 827-49.

McLEAN, J., and SULLIVAN, J., concurred.

Judgment for demurrer.

BLAKE V. HARVEY.

A. and B. gave a joint and several promissory note to C., who endorsed it to D., B. signing as surety for A., who promised to indemnify B. against the payment thereof, and an action was brought by the holder against A. B. and C. for the amount of the note, which was paid by B. together with the costs of suit. In an action brought by B. against A. for contribution, *Held*, that B. was entitled to recover the amount of debt paid by him, being a mere surety, and also a moiety of the costs as jointly liable.

Writ issued 8th April, 1851. Declaration 22nd April, 1851.

First count is special.—That on the 3rd of April, 1848, in consideration that plaintiff would join with defendant in signing as maker, a promissory note, jointly and severally promising to pay C. Miller or order 10*l.* 1*s.* 3*d.* on the 1st of January then next (1849,) for defendant's use and benefit—defendant promised plaintiff to indemnify and save him

harmless from the payment of the said sum of money, and any loss or damage which he should suffer for, or by reason of his making the said note : that plaintiff did join as a maker in said note : that the payee endorsed it to one Stevenson, yet defendant did not indemnify and save plaintiff harmless ; in consequence whereof, he was called on, forced, and obliged to pay the said holder, the amount of the said note and interest, and a large sum for the costs of an action brought by such holder in the County Court, upon the note against the plaintiff, whereby the plaintiff is damnified.

2nd count.—Money lent, paid, money found due, and an account stated.

Pleas—1st. *Non assumpsit* and issue.

2nd. Set-off, work and labor, goods sold, money lent, had and received, &c.

3rd. To 1st count.—That plaintiff did not make the said note for the accommodation and at the request of defendant—to the country and issue.

At the trial before Mr. Justice McLean, at the last assizes held in and for the united counties of Frontenac, Lennox, and Addington, the plaintiff proved the making of the note as stated and described in the declaration, and that he had become a party thereto as a joint and several maker, as a mere surety at defendant's request ; that defendant did not pay it, but that an action was brought by the holder against both plaintiff, defendant, and the payee who had endorsed it, in the County Court, which was apparently tried on the 4th of July, 1849, (when instituted not appearing,) and that execution against plaintiff's goods, issued in October, and a *ven. ex.* the 8th December following, under which he was compelled to pay the amount of the note, interest, and costs, in all 24*l.* 15*s.* 7*d.*, with interest from 31st October, &c., the debt being marked 10*l.* 16*s.* 9*d.*; costs, 10*l.* 11*s.* 4*d.*; *fi. fa.* 16*s.* 3*d.*; *ven. ex.* 18*s.* 9*d.*; interest, 6*s.* 3*d.*, and sheriff's fees, 1*l.* 6*s.* 3*d.*

The defendant proved some small items of set-off ; also, that in the year 1848 he had worked or assisted in working the plaintiff's farm on shares—that is, to receive a moiety—and raised a crop of peas and some other grain, which on

being harvested were placed in the plaintiff's barn; that before any division thereof, the plaintiff took the peas and locked up the barn, saying the defendant owed him, and he would keep the peas until he got paid; that the plaintiff afterwards threshed them out and took them away; that there was about 150 bushels in all, worth 2s. 6d. a bushel, which would make the defendant's share equal to about 9l. 7s. 6d. The jury found a verdict for the defendant with 6s. 3d. surplus, under the plea of set-off, apparently allowing the defendant 9l. 7s. 6d. for the peas, and 1l. for the work, and deducting therefrom 10l. 1s. 3d. for the note, See statute 11 Geo. IV. ch. 5.

In last Easter Term, *Macdonald*, Q. C., obtained a rule, calling on the defendant to shew cause why such verdict should not be set aside and a new trial had, &c., as being contrary to law and evidence.

Smith, Q. C., shewed cause in the same term and contended—1st. That the evidence did not support the 1st count.

2nd. That a set-off was admissible against the demand as for money had and received.—1 Cow. 56.

3rd. And that the plaintiff was not entitled to be indemnified in the costs as well as the amount of the note and interest, inasmuch as he had retained the defendant's share of the peas and converted them to his own use, thereby depriving the defendant of the means of satisfying the note when it became due on the 1st of January, 1849, and yet not paying it himself, though he had the means in his hands—wherefore, the jury were well warranted in rejecting the claim for the costs subsequently incurred, and which the plaintiff ought to have prevented; that damages were in their discretion, and the circumstances went in mitigation thereof, although not pleaded specially.

Macdonald in reply, contended—that the defendant was *prima facie* liable to indemnify the plaintiff fully, including the costs of the suit, of which (being sued together) he had notice.

That he could not have applied defendant's share of the peas to the satisfaction of the note, without his assent,

and that no direction or assent thereto was proved; that the evidence does support the first count, and under the pleadings the breach is admitted if the contract is established as it was—and if so, that the alleged wrongful act of the plaintiff respecting the peas, could not be set up in mitigation of damages, which would virtually be setting off one wrong against another.—See 14 Ver. 170; Byles on Bills, 182 n.; *ib.* 6 n.; Chitty on Contracts, 400; Pownall v. Ferrand, 6 B. & C. 439; Pitt v. Purssord, 8 M. & W. 538; Seaver v. Seaver, 6 C. & P. 673; Davies v. Humphries, 6 M. & W. 153. As to contribution of a moiety of the costs—Kemp v. Finden, 12 M. & W. 421; Catton v. Simpson, 8 A. & E. 136; Pitman, 125, 134–5; 2 T. R. 100; Bleaden v. Charles, 7 Bing. 246; M. & M. 247, 406, 487; 5 Esp. 171; Roach v. Thompson, 4 C. & P. 194; Smith v. Compton et al., 3 B. & Adol. 407; Short v. Kalloway, 11 A. & E. 28; Pennell v. Woodburn et al., 7 C. & P. 117. Lewis v. Peake, 7 Taunt. 153; Neale v. Wyllie, 3 B. & C. 533; Reynolds v. Doyle, 1 M. & G. 753; Collinge v. Heywood, 9 A. & E. 633.

The plaintiff was at all events entitled to recover under the count for money paid, all the principal and interest, as being a mere surety, and a moiety of the costs, as jointly liable. The endorser sued jointly with plaintiff, and defendant would not be bound to contribute.

MACAULAY, C. J.—On these pleadings I cannot say I think the defendant was entitled in the first place to avail himself of the value of the peas in question, as a set-off, as for goods sold and delivered, or money had and received by plaintiff to his use, in reduction of the plaintiff's demand for the amount of the note under the count for money paid and then to use, thus adopting by implication the plaintiff's acts in disposing thereof, and treating his liability as one of contract, and approving it, and then treating the same conduct as wrongful, and using it in mitigation of damages against the plaintiff's claim, to be indemnified in the costs and interest, as well as the principal amount of the note.

If the facts constituted a good defence as shewing the plaintiff damnified of his own wrong, such defence ought

to have been pleaded, but the only pleas at all applicable, are a denial of the contract to indemnify and a set-off. The contract is proved as a legal inference arising from the plaintiff having become a surety at the defendant's request, and the alleged breach is not denied. I infer from the cases, that however the plaintiff might be estopped from proving himself a surety and not a principal, contrary to the import of his note as against third parties, or indorsees for value, &c., according to the later decisions, he is not so estopped as between himself and his principal the present defendant; and that, however one of several parties only severally liable, may be precluded from exacting contribution for costs of suit against the others, or one of several partners may be prevented from suing the others for contribution when there is a joint partnership formed primarily liable, and it is clear that one of the two *joint* contractors in an isolated transaction, and not partners or only *severally* liable, may sue for contribution in relation to both the debt and costs, when (as here) sued together; and that a surety has a right to recover from his principal, not only the debt, but costs of suit, in an action of which the principal has notice, as in this case, both being sued together.

Then the breach of contract to indemnify as respects both debt and costs being admitted on this record, I do not perceive any satisfactory principle on which the defendant's alleged tortious conduct respecting the defendant's share of the peas is admissible in mitigation of damages, such damages consisting of debt and costs, or restricted to the costs alone: they have no connection the one with the other. The defendant does not prove a request to plaintiff to apply them in raising funds to satisfy the note, or shew that he was prevented retiring it by reason of the plaintiff's withholding his share of the peas. It is merely setting up a wrongful act of the plaintiff, in usurping or setting up a lien as to an undivided moiety of some property owned jointly by both, or to a moiety of which defendant, at all events, was entitled under a contract to farm a piece of plaintiff's land on shares, as a bar, or in reduction of damages by reason of defendant's breach of a contract to

indemnify him against a pecuniary liability, incurred by the plaintiff at his request—if admissible in mitigation of damages, it might reduce them to a nominal sum, and that would shew it really matter in bar of the action or of the claim for costs; so it ought to have been pleaded *pro tanto*, as respected the costs at any rate.

I think the plaintiff should be allowed a new trial on payment of costs.

McLEAN, J., and SULLIVAN, J., concurred.

GABRIEL V. DERBYSHIRE.

A declaration made under the statute 5 George II. ch. 7, by a party residing in parts beyond the sea, and who could not be received to state on oath at the trial the facts therein contained, is inadmissible in evidence.

Writ issued 3rd February, 1851; declaration 28th February.

This is an action of assumpsit on a bill of exchange dated the 16th September, 1847, drawn by Deighton, upon and accepted by defendant, for 33*l.* 13*s.* sterling, at three months after sight, payable, &c., endorsed to plaintiff; also on another bill at six months' sight, and common counts.

Pleas—Denial of the alleged indorsements of the bills to plaintiff, and issue: non assumpsit to common counts.

At the trial, before Draper, J., at the last assizes held in and for the united counties of Stormont, Dundas, and Glengarry, both bills were produced, amounting together to 99*l.* 13*s.* To prove the endorsement, the plaintiff's counsel put in a *declaration* of the plaintiff, made by him under the statute 5 Geo. II. ch. 7, certified by the Lord Mayor of London, under the city seal, which declaration averred, but was the only proof of, the endorsements.

Defendant's counsel objected that such proof was insufficient. The objection was overruled, and a verdict rendered for plaintiff for the amount of the two bills.

The declaration in the two first counts, states the bills to have been drawn by William Deighton on the 16th September, 1847, in parts beyond the seas—to wit, at London,

in England—to his own order, for 33*l.* 13*s.* sterling each, at three and six months' sight respectively, upon and accepted by defendant—not saying where; and that the said Deighton then endorsed them to the plaintiff. There are also the common counts. To the two first counts, defendant pleads that Deighton did not endorse, and to the residue non assumpsit.

The bills were produced at the trial, dated London, September 16th, 1847, drawn by William Deighton upon Stewart Derbyshire, Esq., Montreal, Canada, where they were protested for non-payment, as appears by the notarial protests annexed to the said bills, made on the 24th of January and 24th of April, 1848, respectively.

On the 16th of February, 1850, the plaintiff, by declaration in writing, made at the Mansion-House in the City of London before Thomas Farncomb, the Lord Mayor, wherein he is described as of No. 135 Regent-street, Westminster, County of Middlesex, woollen-draper.

The plaintiff stated that the defendant, of Montreal, Canada, Esq., was justly and truly indebted to him in the amounts of and upon the two bills of exchange declared upon, and which bills were duly endorsed by the drawer William Deighton to him, &c., together with expenses of protest and interest, &c., which was then justly due and owing and unpaid; such declaration being made pursuant to the statute 5 & 6 Wm. IV. ch. 62, and it certified under the seal of the City of London by the said Lord Mayor, pursuant to the statute 5 Geo II. ch. 7, and 5 Wm. IV. ch. 62; all which was produced at the trial, open and not close under the seal.

The statute 5 Geo. II. ch. 7, enacted that in any action or suit then depending, or thereafter to be brought in any court of law or equity, in any of the plantations and colonies in America, for or relating to any debt or account wherein any person residing in Great Britain should be a party, it should be lawful for the plaintiff or defendant, and also for any witness, to be examined or made use of in such action or suit, to verify or prove any matter or thing by affidavit or affidavits in writing upon oath (or affirmation if a

Quaker) made before any mayor, or other chief magistrate of the city, &c., in Great Britain, where or near to which the person making such affidavit or affirmation should reside, and certified and transmitted under the common seal of such city, &c., or the seal of office of such mayor, &c.; which oath or affirmation, every such mayor, &c., was thereby empowered to administer; and every affidavit, &c., so made, certified, and transmitted, should in all such actions and suits, be allowed to be of the same force and effect as if the person or persons making the same upon oath or affirmation as aforesaid, had appeared and sworn or affirmed the matters contained in such affidavit or affirmation *viva voce* in open court, or upon a commission issued for the examination of witnesses, or of any party in any such action or suit respectively, provided that in every such affidavit, &c., there shall be expressed the addition of the party making such affidavit, &c., and the particular place of his or her abode.

The imperial statute 5 & 6 Wm. IV. ch. 62, for abolition of unnecessary oaths, sec. 7, provides that nothing therein contained shall extend or apply to any oath, affirmation, or affidavit, which now is or thereafter may be made or taken, or be required to be made or taken in any judicial proceeding in any court of justice, &c.; but all such oaths, &c., to be continued as formerly.

But sec. 15, reciting the statute 5 Geo. II. ch. 7, and that it was expedient that in future a declaration should be substituted in lieu of the affidavit or oath authorized and required by the said act and by statute 54 Geo. III. ch. 15, therein also mentioned, enacted that in any action or suit then depending or thereafter to be brought or intended to be brought in any court of law or equity within any of the territories, plantations, colonies, or dependencies abroad, being within any part of his Majesty's dominions, for or relating to any debt or account, wherein any person residing in Great Britain or Ireland should be a party, or for or relating to any lands, tenements, or hereditaments, or other property situate, lying and being in the said places respectively, it should and might be lawful to and for the

plaintiff or defendant, and also to and for any witness, to be examined or made use of in such suit or action, to verify or prove any matter or thing relating thereto, by solemn declaration or declarations in writing in the form in the schedule thereto annexed,—Form ; “ I, A. B., do solemnly and sincerely declare that, &c., and I make this solemn declaration conscientiously,” &c.; and made before any justice of the peace, notary public, or other officer, then by law authorized to administer an oath, and certified and transmitted under the signature and seal of any such J. P., notary, &c., which declaration and every declaration relative to such matter or thing as aforesaid, such J. P., &c., is empowered to administer; and every declaration so made, certified, and transmitted, should in all such actions and suits, be allowed to be of the same force and effect as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in open court, or upon a commission, &c., issued for the examination of witnesses, or of any party in such action or suit respectively.

Cameron obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered pursuant to leave reserved, or why the verdict should not be set aside, and a new trial be had between the parties, the verdict being contrary to law and evidence, and for misdirection, and for the reception of improper evidence.

The *Solicitor General* shewed cause, and referred to the case of *Gordon v. Fuller* in the Q. B. U. C. as establishing that the statute 5 Geo. II. ch. 7, was in force here as respects the affidavits of witnesses resident in England, and that the act not only renders the affidavits of plaintiffs or defendants admissible when under like circumstances they would be admissible if made in Upper Canada, but that it by implication renders them admissible at the trial in favor of the party making the same, and that notwithstanding such affidavits were sworn to before the suit or action was instituted and not entitled in any cause or court.

For the defendant, *Cameron* contended—the declaration was inadmissible, not only on the general ground

that the plaintiff, if personally present, could not have been examined *viva voce*, and therefore his affidavit or declaration could not be read ; but because it is not entitled in any court or cause, and was sworn to long before the commencement of the suit, or the joining of any issue to be tried ; wherefore it must have been made *alio intentio*, and not in support of the present action, or the issues joined therein ; that the statute should be construed distributively according to the admissibility of the declaration offered.

That before suit, there can be no plaintiff or defendant, and that if otherwise unexceptionable, it is not certified and transmitted under seal, within the meaning of the act produced, as it was, open by the plaintiff's counsel at the trial.

MACAULAY, C. J.—It was decided in the case of Gordon v. Fuller that the statute 5 Geo. II., ch. 7, relating to evidence, was in force here, notwithstanding the local laws made by the provincial legislature, and it follows, that the provisions of the 5th and 6th Wm. IV., ch. 62, are equally applicable.

Upon reading the 7th section, excepting judicial oaths from the operation of that act, I was not prepared to find in section 15 that declarations were, notwithstanding, to be received in the colonial courts, as if the solemn declaration of a party or witness made in Great Britain or Ireland, was equivalent to the *viva voce* evidence of the same party on oath, if present at the trial in a colonial court.

However, I nevertheless think such *declarations* receivable only when the oath of the person, if present, would be admissible. It may have been the intentions of the statutes above mentioned, to render parties admissible in their own favor, contrary to the rules of evidence that prevail in this court ; but it is not clearly so declared. I am therefore of opinion, that inasmuch as the plaintiff could not (if present) have been received, to state on oath at the trial the facts contained in his declaration, the declaration cannot be received as a substitute. I do not think that a party, by going to and residing in Great Britain or Ireland, can

become entitled to prove his own case, whereas if present he could not be received to do so.

As to the want of entitling of the declaration, and its being made before action brought, and its being transmitted open, it is unnecessary to express an opinion, deeming it inadmissible, however formally made and transmitted.

McLEAN, J.—This action was brought on two bills of exchange drawn by one Wm. Deighton, endorsed to plaintiff, and accepted by the defendant. There are also the common counts.

To the counts on the notes the defendant pleads, that the bills were not endorsed by William Deighton, who drew them payable to his own order.

To prove the endorsement on the trial, the plaintiff produced his own declaration taken on the 16th of February, 1850, before the Lord Mayor of London, and he claimed to use that declaration as evidence of the endorsement under the statute 5th Geo. II. ch. 7, and the act 6 Wm. IV. ch. 62, by which declarations are substituted for oaths under that act. By the 1st section 5 Geo. II. ch. 7, it is enacted, that in any action or suit then depending, or thereafter to be brought in any court of law or equity, in any of the plantations, for or relating to any debt or account wherein any person residing in Great Britain shall be a party, it shall and may be lawful for any plaintiff or defendant, and also to and for any witness, to be examined or made use of in such action or suit, to verify or prove any matter or thing by affidavits in writing upon oath, or (in case of Quakers) by affirmation, before any mayor or other chief magistrate of the city, &c., in Great Britain, where or near to which the person making the affidavit or affirmation shall reside, and certified and transmitted under the common seal of such city, &c.; and every affidavit or affirmation so made, certified and transmitted, shall in all such actions and suits be allowed to be of the same force and effect, as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such affidavit or affirmation *viva voce* in open court, or upon a commission issued

for the examination of witnesses, or of any party in such action or suit.

This statute was passed for the more easy recovery of debts in his Majesty's colonies and plantations in America, and it was quite enough that it gave to persons residing in Great Britain, facilities for the examination of witnesses in suits which had been brought or which might be intended to be brought for debts in the plantations, which the persons residing in the plantations could not enjoy in reference to debts due to them in Great Britain. It was never intended however to subvert the whole law of evidence, and to make every man in Great Britain a competent witness in any case of his own, pending, or intending to be brought, in the plantations. The whole object was to afford to a plaintiff or defendant, an easy mode of making affidavits which they might be competent to make in any cause, and at the same time to enable them to procure the testimony of witnesses in a more summary and convenient nanner. Now that declarations are substituted for oaths in such case, it is too much to expect that courts in the colonies will receive such declarations as evidence, when the parties making them are from interest wholly incompetent to give any evidence in the cause even on oath.

There is not in this case any testimony offered but the mere declaration of the plaintiff of the endorsing of the bills declared on, and as he would not be competent to make any statement on oath on the trial here, I think his declaration cannot be received as evidence, and that the verdict must be set aside, and a new trial granted without costs.

SULLIVAN, J.; concurred.

RUSSELL V. CROFTON.

The certificate of a notary on the adjoining half sheet of the protest, that he had served on the endorser a notice of non-payment of the note protested upon, is sufficient evidence of notice to the endorser of non-payment thereof.

A protest without seal is admissible as evidence of the facts therein contained under the statute 13 and 14 Vic. ch. 23, sec. 6.

This is an action of assumpsit by the endorsee against

the payee and endorser of a promissory note made by John J. King, on the 13th July, 1849, for 25*l.*, payable to the defendant or order three months after date.

The defendant pleaded—1st. That the note was not duly presented.

2nd. That he had not due notice of non-payment.

3rd. That he did not endorse.

At the trial, before Mr. Justice Draper, at the last assizes held in and for the united counties of Stormont, Dundas, and Glengarry, the endorsement was proved; and to prove presentment and notice of the note in question, which was produced, and purported to be made in Montreal on the day of the date thereof as above alleged, a protest in duplicate (one whereof remained of record in the office of Wm. Easton, Esq., the notary,) was put in, shewing that on the 16th of October, 1849, the said notary presented the said note to the maker, at his place of business in Montreal, and payment demanded but not made; wherefore the said notary, at the request of the holder, protested against the promiser and endorser of the said note, for all costs, damages and interest, present and to come for want of payment of the said note, all which was attested under his signature. On the adjoining half-sheet it was certified by the said notary, that on the 18th of October, 1849, he served due notice in the form prescribed by law, of the foregoing protest of the note thereby protested, upon the endorser thereof, naming the defendant as the one in person, at Montreal, aforesaid.

It was objected by the defendant, that this did not sufficiently prove notice of non-payment; but the learned judge overruled the objection, and the plaintiff had a verdict.

The objection was renewed last term, and was opposed by the *Solicitor General* in the first instance.

The question depends upon the provincial statutes 7 Vic. ch. 4, sec. 2; 12 Vic. ch. 22, sec. 12; and 13 & 14 Vic. ch. 19, sec. 2, and ch. 23, sec. 6.

For defendant, *Cameron* contended the protest was inadmissible without seal under the 7th Vic. ch. 4, sec. 2; that the 12th Vic. ch. 22, sec. 12, related to Lower Canada

exclusively; and that the 13 and 14 Vic. ch. 19, and ch. 23, did not render the proof sufficient, being a separate certificate made two days after the protest and no necessary part thereof, and at all events too late.

The *Solicitor General*, for plaintiff, contended the whole formed one complete protest, it being a part of the notary's duty to give notice as well as to present the note: that no seal was necessary (*Goldie v. Maxwell*, 1 U. C. Q. B. R. 434); and that the notice was in good time according to the law in Lower Canada.—*City Bank v. Ley*, 1 U. C. Q. B. R. 192.

MACAULAY, C. J.—The statute 7 Vic. ch. 4, sec. 2, enacts that any note, memorandum, or certificate, made by one or more notaries public either in Upper or Lower Canada in his own handwriting, or signed by him at the foot of, or embodied in any protest, shall be presumptive evidence in Upper Canada, of the fact of any notice of non-acceptance or non-payment of any promissory note or bill of exchange having been sent or delivered at the time and in the manner stated in such note, certificate or memorandum. Sec. 3 enacts that the production of any protest on any promissory note or bill of exchange under the hand and seal of any one or more notaries either in Upper or Lower Canada, in any court in Upper Canada, shall be presumptive evidence of the making of such protest.

The 12th Vic. ch. 22, regulates the protesting of notes and bills in Lower Canada. Sec. 9 provides that public notaries shall protest them; and sec. 10, write or stamp "protested for non-payment" thereon.

Sec. 2 allows three days' grace.

Sec. 11—notice of protest if delivered personally, or deposited in the nearest post-office prepaid, sufficient.

Secs. 14 and 19 provide that service of notice of protest for non-payment within three days next after the day upon which such bill or note shall have been protested, shall have the same force and effect as if such service had been made upon the day of protesting the same.

Sec. 25 makes the law of England the rule when not otherwise provided.

Sec. 29 renders valid the forms in the schedules Nos. 5, 8, and 9, relating to the present case. No. 8 is in the form of the letter to the endorser informing him that the note (described) was duly protested for non-payment. Nos. 5 and 9 are the forms of protest and act of notarial service.

Sec. 12 enacts that the duplicate protest and notice afore-said (see sec. 9), with the service of such notice duly attested under the signature of the protesting notary, shall be received and taken by all courts, &c., within Lower Canada to be *prima facie* evidence of the truth of the matters in such protest and notice and service thereof respectively.

13 and 14 Vic. ch. 19, sec. 2, enacts that any notarial copy of any notarial act or instrument in writing made in Lower Canada before any notary, shall be receivable in evidence in any judicial proceedings in Upper Canada, &c.

13 and 14 Vic. ch. 23, sec. 6—all protests of bills of exchange and promissory notes, shall be taken and received in all courts of law and equity in this province to be *prima facie* evidence of the allegations of facts therein set forth and contained.

If any doubt could arise whether a duplicate protest, &c., valid and receivable in evidence in Lower Canada under the 12th Vic. ch. 22, sec. 12, could be received in this court under the 7th Vic. ch. 4, sec. 2, by reason of the mention of a *seal* in sec. 3 of the last act, it would be effectually dispelled by the 13 and 14 Vic. ch. 23, sec. 6. This makes *all protests* receivable in evidence, as the first act does any note, memorandum or certificate of any notary in Upper or Lower Canada, at the foot of, or embodied in any protest, &c.

I see no room for any doubt on the subject, and consider the duplicate produced clearly admissible.—Bradbury v. Doole, 1 U. C. Q. B. R. 442; Matthewson v. Carman, *ib.* 259; Smith et al. v. Hall, 3 U. C. Q. B. R. 315; Bank of B. N. A. v. Ross, 1 U. C. Q. B. R. 199; Goodman v. Harvey, 4 A. & E. 870; Byles on Bills 203 (d); Armstrong v. Christiani, 5 C. B. 687; 17 L. J. C. P. 181; S. C., 4 D. & L. 744.

McLEAN, J., and SULLIVAN, J., concurred.

CHAPMAN V. BISHOP AND BLACKSTONE.

Plaintiff and defendant resided at about three miles distance from each other : the mail ran between both places and closed at where plaintiff resided on Monday, Wednesday, and Friday, in each week ; the bill declared upon was presented for payment on Monday the 4th, being the last day of grace, and not paid ; there being no mail on the 5th, notice was served on defendant by a special messenger on the 6th before it could have reached him had it been mailed on that day : *Held*—that the notice served on the 6th was in good time.

Assumpsit against Blackstone as acceptor, and Bishop as drawer of a bill of exchange for 35*l.*, dated Holland Landing, 30th April, 1850, payable on or before the 31st November then next, to Henry Chapman or bearer. Blackstone suffered judgment by default. Bishop pleaded a denial of due notice of dishonor.

The plaintiff proved by a witness that he served a written notice on defendant personally on the morning of the 6th of November last. The defendant called a witness, who said it was served on the 1st of November.

It appeared that the plaintiff and Blackstone lived at Holland Landing, where the bill was duly presented on Monday, the 4th of November, being the last day of grace ; that the plaintiff lived about one mile from Sharon ; that Sharon is about $2\frac{1}{2}$ miles from Holland Landing, but that defendant was served with notice, not at his own residence, but at the house of another person about the same distance from Holland Landing, where he was working at his trade of a carpenter ; that those places are all within the county of York ; that there is a post-office at both Holland Landing and at Sharon ; that the mail closes at Holland Landing three times a week—viz. on Monday, Wednesday, and Friday evenings, at six p. m., and leaves for Sharon early the following morning, and of course reaches that place early that day.

The jury were told to find for the plaintiff, if satisfied that the notice was served on the 6th, and not the 1st of November ; but it was not distinctly left to them as a mixed question to decide whether a notice on the morning of the 6th was due diligence on the plaintiff's part. They however found a verdict for the plaintiff for the amount of the bill, and assessed damages against both defendants. The

jury would, I doubt not, have found due diligence if it had been left to them in that form; but as it was, it can only be taken that they found the actual time of service, leaving it a question of law whether it was sufficient.

In the early part of last term, *Wilson*, Q. C., for defendant, obtained a rule, upon reading the postea and the notes of the Chief Justice of this court, who tried this cause, calling on the plaintiff to shew cause why the verdict rendered against the defendant Bishop should not be set aside and a new trial granted to him, and that in the meantime proceedings be stayed.

Crooks shewed cause, and objected to this rule in point of form, as improperly referring to the judge's notes, and in not stating any ground of exception to the verdict.

On the question of notice, he contended it was in good time according to the course of post and the mode of service adopted, especially as any imported *laches* was waived by the conduct of the defendant on receiving the notices, &c. *Hewett v. Thompson*, 1 Moo. & Rob. 544; *Chitty on Bills*, 472-3.

Wilson, in reply, submitted that the rule was regular and sufficient (*Regina v. Virrier*, 12 A. & E. 317; and cases of torts before sheriffs); and on the main point contended the notice was too late, the parties being within so short a distance that they should be regarded as virtually residing in the same place within the spirit of the cases. The area of places being very indefinite, a distance of two and a half or three miles entitled the defendant to notice the day after the dishonor, especially as the plaintiff did not avail himself of the post on Wednesday, if that would have been sufficient; that the delay was unnecessary. is not accounted for satisfactorily, and plaintiff by *laches* made the bill his own. He cited 2 Cam. 208; *Edmunds v. Oats*, 2 Jurist, 183; *Derbyshire v. Parker*, 6 East, 3; *Hordern v. Dalton*, 1 C. & P. 181; *Jameson v. Swinton*, 2 Taunt. 224; 4 Tyr. 1002; 1 M. & M. 61; *Holt*, 476; *Miers v. Brown*, 11 M. & W. 372.

MACAULAY, C. J.—As to the reference to the judge's notes and the omission of any distinct ground in the rule

nisi, the following cases are applicable; 3 Dow. 492, 525; 2 Dow. 352; 4 Tyr. 267; Rex v. Grant et al. 5 B. & Adol. 1081.

There is reason to question the rule nisi in point of form; but the inadvertent omission of more specific grounds of objection to the verdict ought to be adduced. On the principal ground, referring to 1 Cam. 246; Scott; v. Lifford, 9 East, 347; Williams v. Smith, 2 B. & A. 501; 4 Bing. 715; 1 M. & P. 751; Bray v. Hadwen, 5 M. & S. 68; Bancroft v. Hall, Holt, 476; 2 Smith, 404; Langdale v. Trimmer, 15 East, 291; Byles on Bills.

The cases warrant the inference that if the plaintiff had availed himself of the post and mailed the notice at Holland Landing in time for the post on Wednesday evening, the 6th of November, it would have been sufficient. He was not bound to have mailed it on Monday evening, the 4th. And there was no post on the 5th. Under these circumstances, and considering that the plaintiff employed a special messenger who delivered notice to the defendant personally on the morning of the 6th before he would have received it by course of post, I am disposed to deem the notice in sufficient time. The parties do not reside in the same place, and the rule seems to be that if they do not, notice by the next available post, or upon alternate days, if there be a daily mail, is due diligence; and by parity then, notice by a special messenger within the time that it would have been received by such post is also sufficient. As the parties lived so near, it renders it a point of nicety; but I do not find the plaintiff is guilty of *laches* because he did not despatch a messenger on the day after the dishonor. Had he done so and not found the defendant at home, notice the next morning personally served would surely have been sufficient, and it amounted to that in effect.

I do not consider that the defendant concluded himself by any implied promise, or acknowledgment of liability, by merely saying he would see the acceptor—but see Chapman v. Annett, 1 C. & K. 552.

It was not left to the jury as a question of fact whether due diligence had been used. I consider it rather one of

law.—the facts themselves being ascertained—and I find such to be the rule.

McLEAN, J., and SULLIVAN, J., concurred.

FAIRMAN V. FAIRMAN.

In trespass, where the entry is laid on a day certain with a *continuando*, the plaintiff under the plea of *not guilty*, is prevented from proving a trespass at an earlier period with a *continuando*, though he may waive the time laid, and recover for a single act of trespass at a more remote period.

Process issued 16th March, 1850 ; declaration, 25th March, 1850. Trespass for mesne profits ; for that defendant—to wit, on the 27th of July, 1849—broke and entered 500 acres of land, &c., in the township of Pittsburgh, of plaintiff's, and ejected and expelled him, &c., and kept and continued him so expelled, and amoved for a long space of time—to wit, from the day and year aforesaid, until and upon the 14th March, 1850—and during all that time took the profits, &c.

Pleas. 1st—not guilty. 2nd—the closes not plaintiff's closes. 3rd—*libèrum tenementum*.

Replications. To 1st plea—*similiter* ; to 2nd plea—that after the said 27th July, 1849—to wit, in Easter Term, 13th Victoria—an ejectment was brought by John Doe on the demise of Kenneth Mackenzie, the demise being laid on the 27th July, 1849, for seven years, of certain lands in Pittsburgh, and on the demise of plaintiff, laid on the same day and for the same term of years of the same lands against the defendant, in which the plaintiff recovered judgment on both demises on the 5th March, 1850, under which a writ of *hab. fac. pos.* issued and possession delivered to said Mackenzie and plaintiff on the 13th March, 1850 ; then avers identity of the closes and of plaintiff with the lessor of plaintiff of the same name ; wherefore he prayed judgment, if defendant, during the said second term, ought to be admitted to plead the said plea.

To the third plea a similar estoppel was replied. Rejoinder—denying the alleged identity of the premises and issue.

At the trial, before Mr. Justice McLean, at the last assizes held in and for the united counties of Frontenac, Lennox,

and Addington, the plaintiff's counsel claimed a right to prove title as far back as the year 1836, and an entry and expulsion by the defendant at that period, and that such expulsion was continued till action brought. It was left to the jury to find for the plaintiff for the whole period, and also to assess damages from the day of entry and expulsion laid in the declaration, and a verdict was entered for the plaintiff for 253*l.* 9*s.* 4*d.*, being for the whole period, with leave to the defendant to move to reduce it to 13*l.* 19*s.* 4*d.*, being the amount assessed for the shorter period. The learned judge refused leave to the defendant to prove title from 1836 down to the day of demise laid in the ejectment, considering that, under the pleadings, he was not entitled to do so.

In last Easter Term *Macdonald*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be reduced according to the leave reserved, or a new trial be granted on the ground that the verdict was contrary to law, for the admission of improper evidence, the rejection of evidence, and for misdirection.

McKenzie, for plaintiff, shewed cause during the same Term. The identity was proved—the premises really being lot No. 36, in the first concession of Pittsburgh, and plaintiff claimed mesne profits for fourteen years. The government patent issued to Donald Grant the 26th March, 1798, who conveyed to P. Grant the 20th June, 1831, who conveyed to plaintiff the 24th June, 1831, who was possessed till 1835, after which he complained the defendant had possessed and taken the profits to the 14th March, 1850.

He contended the plaintiff was not limited to a continued trespass within the time laid in the declaration, or to a single act of trespass (without being at liberty to prove a *continuando*,) upon a day anterior to the 27th July, 1849, as contended by the defendant's council, but that under the plea of not guilty (which admitted the plaintiff's possession) he could recover for any length of possession he could prove against defendant; that there was no principle in a contrary rule, time being immaterial and only laid *pro forma*; the *continuando* as laid, or trespass laid on

divers days and times, were equivalent ; and that the replication of estoppel did not restrict him to the period from the day of the demise only, although it concluded the defendant from disputing his title under the 2nd and 3rd pleas anterior to, as well as within such period. On the point of estoppel, he cited *Doe v. Wright*, 10 A. & E. 763, and *McKenzie v. Fairman*, in this court.

On the question of retrospective right, he cited *Higgins v. Highfield*, 13 East, 407 ; 9 Dow, 993 ; 1 Star. 351.

Macdonald, Q. C., in reply, submitted that the rule was well settled, that in trespass laid on a certain day, (though under a *videlicet*,) with a *continuando*, the plaintiff was confined to the time so laid ; or waiving it, he could prove a single act of trespass on an earlier day—but a single act only, and not within a *continuando* ; the reason assigned being, that by laying a trespass with a *continuando*, time is made descriptive of the injury and ceases to be mere form—*Monckton v. Pashley*, 2 Lord Raymond, 974 ; 1 Star. 351 ; consequently that under the plea of not guilty, the plaintiff could not shew title in himself, and an entry and ouster by the defendant in 1836 continued thenceforward ; and that if he could, the plaintiff had limited himself to the day of the demise in the ejectment, by pleading it as an estoppel to the 2nd and 3rd pleas, which had been held to lock up the defendant so that he could not prove title in himself from 1836 down to the day of such demise. Wherefore the estoppels being mutual, the plaintiff was equally estopped, and on the whole record the plaintiff could only recover judgment for the shorter period—that is, from the 27th July, 1849.

He referred to *Polkinghorn v. Wright*, 8 Q. B. 197 ; 15 L. J. 70, S. C. ; *Cheasley v. Barnes*, 10 East, 73 ; *Sherwin v. Swindall*, 12 M. & W. 582.

MACAULAY, C. J.—The case of *Doe v. Wellsman*, 2 Ex. 368, 6 D. & L. 179, 18 L. J. Ex. 277, shews clearly that the replications to the 2nd and 3rd pleas only estop the defendant from the day of the demise ; but that day being also the day laid in the declaration, he is, (if the pleas are valid,) completely estopped in this action ; and so, by parity of

reasoning, and the rule of mutuality, is the plaintiff. See also *Bather v. Brayne*, 7 C. B. 815.

That the breaking and entering is the gist of the action, and the expulsion matter of aggravation; and that when (as here) an entry on a day certain with a *continuando* is laid, the plaintiff, under the plea of not guilty, is prevented from proving a trespass upon his (admitted possession) at an earlier period with continuance, though he may waive the time laid and recover for a single act of trespass at a more remote period of time, are clearly established by the authorities. The rule is laid down, recognized and reported too often, to admit of its dispute now, though its correctness has been questioned.—4 Pt. Star. Ev. 1441 note (y).

That a recovery in ejectment only concludes the defendant from the day of the demise is equally clear; and on the evidence therefore, applied to the whole record, the plaintiff seems to me only entitled to recover 13l. 9s. 4d. and the verdict should be rendered accordingly.

In addition to the cases cited, I would mention *Ch. Jr. Forms*, 723 note (i); 2 C. M. & R. 316; 5 Tyr. 846; 4 Dow. 437; *Collier v. Hicks et al.* 2 B. & Adol. 662; 9 Dow. 993; 1 Saund. 23-4; *Brook v. Bishop*, 6 Mod. 152; S. C. 2 Lord Ray'd, 823; S. C., Sal. 639; 2 Moore 91; *Skin.* 641; *Holmes v. Wilson et al.* 10 A. & E. 503, and *Doe v. Wright*, ib. 863; 1 P. & D. 673; 12 Ju. 647; 12 Ju. 1000; 2 Ex. R. 654; 1 A. & E. 790; 14 Ju. 396; 1 M. & R. 221.

The first part of defendant's rule being granted, it is unnecessary to consider the second or alternative part.

McLEAN, J., and SULLIVAN, J., concurred.

BROWN V. MARSH, ADMINISTRATOR OF JAMES MARSH, DECEASED.

Pleading—Express or Implied Promise.

In an action of assumpsit against the defendant as administrator, &c., the first count of the declaration stated that the defendant's intestate endorsed a promissory note (which was set out), and that after endorsement and before the note became payable, the intestate died. The count shewed a due presentment of the note, which was payable at a particular place, and averred in excuse for the omission of notice of non-payment, that, "at the time the said note became due, no letters of administration to the estate and effects" of the in-

testate "had been granted to any person, nor had any person administered thereto." There were other counts in the declaration, and it concluded with an averment that "afterwards, &c. the defendant as administrator as aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said several moneys on request." *Held*, that the plaintiff was entitled to judgment, for that, assuming the above excuse for the omission of notice of dishonour to be insufficient, the promise alleged must be taken to be an express promise, and was supported by a sufficient consideration. *Semble*, the matter of excuse was sufficient.

Declaration, 9th of April, 1851.—Second count states that John C. Spragg, in the lifetime of James Marsh, made his promissory note, and thereby promised to pay said James Marsh, or order, at the office of the Bank of Upper Canada, and not elsewhere, 25*l.*, three months after date, which period had elapsed before suit, and that said James Marsh endorsed the same to the plaintiff; then alleges presentment at the office aforesaid, and non-payment; and that after such endorsement and before the note became due—to wit, on the 1st of November, 1848—the said James Marsh died intestate; and that at the time said note became due, no letters of administration to the estate and effects of said intestate had been granted to any person, nor had any person administered thereto. At the end of the third count it is averred, that afterwards—to wit, on the 1st April 1850—defendant as administrator as aforesaid, in consideration of the premises respectively promised the plaintiff to pay him the said several moneys on request, yet defendant did not pay, &c.

Special demurrer—causes :

1st. Uncertainty, not setting forth in full the name of the maker, &c.

2nd. No notice of non-payment given or left at the last place of residence of the intestate, or to defendant, at any time after letters of administration had been granted to him; and no valid excuse for the want of notice is shewn.

The first ground was abandoned on the argument. On the second, *John Duggan* for defendant, contended there was no averment of notice, nor any excuse therefor, except by implication arising from the allegation of the death of the intestate before the note became due, which was insufficient. He cited *Byles on Bills*, 216 note, and 223; 14 *Jurist*, 352; 13 *Jurist*, 495.

Strong, for plaintiff, contended the death of the payee was a sufficient excuse for not giving notice, there being no administrator. He referred to *Byles on Bills*, 226, and *Masson v. Hill*, 5 U. C. Q. B. R. 60, and submitted that a notice left at the former residence of a deceased person would be useless, and that there was no authority requiring it to be served on the ordinary.

MACAULAY, C. J.—It was not, I understood, contended that the promise to pay was an express and not an implied one, or that it was supported by a sufficient consideration to sustain the action against the defendant as administrator, although no notice of dishonour is alleged.

I find no authority for the omission of notice altogether, unless there be an express promise to pay, supported by adequate consideration in the other facts stated. In some cases, promises to pay have been deemed evidence in support of the averment of due notice (see *McCunniffe v. Allen et al.* 6 U. C. Q. B. R. 384), but not as dispensing with it; nor does the death of a drawer or endorser intestate, seem to dispense with any notice at all. The original implied promise of an endorser is a qualified one—namely, that he will pay if the maker or acceptor do not, to which the rule is superadded, provided he receive due notice of non-payment; and it is not until due presentment and notice, that the implied promise to pay on request arises; no such promise arose in the present case during the lifetime of the intestate, and no notice having been given after his death, to the defendant as administrator, upon or after his appointment, or otherwise previously thereto, I do not see that the law raised by implication, a promise by him as administrator to pay this note on request, and (on the same principle) all other dishonoured bills or notes to which the intestate was a party, as endorser or drawer, and which had been merely presented at maturity.

Even if the want of an administrator would excuse notice until his appointment, it does not follow that it should not be given when the estate of the intestate is represented by one duly authorized by law, the matter being in the meantime in abeyance, and the Statute of Limitations not

running. If a notice should have been served on the ordinary, it is not alleged that there was an ordinary, or that it was done.

The letters of administration relate, by fiction of law, to the time of the intestate's death ; wherefore, notice served where the deceased had lived and left effects, before the grant of administration, may, by construction of law, be deemed to have been served on the administrator at that place, he being administrator at the time by relation, and upon his appointment, entitled to receive possession of the letters and papers of the intestate touching or relating to the personal estate.

The first consideration however is, whether the plaintiff is not entitled to judgment on the demurrer, irrespective of the question of notice of non-payment.

A demurrer must be distinguished from a point arising out of facts given in evidence at the trial of an issue. The plaintiff in the second count alleges, with time laid, that in consideration of the premises, the defendant as administrator promised to pay. Now if the promise can be implied by law from the facts previously stated, it proves the count to be good ; if it cannot, it must then be intended by the court to have been an express promise, and it is reduced to the question whether the facts stated are sufficient to support an express promise ; for if so, the plaintiff is entitled to judgment.—11 A. & E. 447. Upon a traverse of the promise, the question might be raised on demurrer, whether it was necessarily an express one, or might be implied as in *Masson v. Hill*, 5 U. C. Q. B. R. 60 ; or at a trial of an issue joined upon a plea of non-assumpsit, if the plaintiff failed to prove an express promise ; but on demurrer if an express one would sustain the action, it may be so regarded—then the facts contain a sufficient consideration to support an express promise by the administrator, supposing it to be such, assets of course being presumed. That an express promise by an endorser discharged by laches *inter vivos*, was not void as being *nudum pactum*, has been much discussed, and was a good deal considered by me in *McCuniffe v. Allen et al* 6 U. C.

Q. B. R. 379, when I entertained and expressed the impression that such a promise would be binding.—Cro. El. 644 ; Arch. N. P. 77 ; Littlefield v. Shee, 2 B. & Ad. 811 ; Barnes et al. v. Hedley et al. 2 Taunt. 193 ; Lee v. Muggeridge, 5 Taunt. 36-47 ; Wennal v. Adney, 3 B. & P. 249, note ; 2 Saund. 136-7, note (e) ; Nelson & Wife v. Serle, 4 M. & W. 795 ; Jones v. Ashburnham, 4 East, 455 ; Brealey, assignee, &c., v. Andrew, 7 A. & E. 108 ; Eastwood v. Kenyon, 11 A. & E. 438 ; ib. 447 ; Petch & Wife v. Lyon, 9 Q. B. 147 ; Seago v. Deane, 4 Bing. 459 ; Cocking v. Ward, 1 C. B. 870 ; 2 Doug. 679 ; Mitchinson v. Hewson, 7 T. R. 348 ; Lundie v. Robertson, 7 East, 231 ; All. 12 ; 1 S. Leading Cases 68, and note.

The above references are to cases in which the sufficiency of mere equitable or moral considerations have been deemed sufficient to support express promises to pay, under circumstances in which the law raised no implied promise to do so.

The elaborate note to the case of Wennal v. Adney, 3 B. & P. 247, was adverted to in Eastwood v. Kenyon, 11 A. & E. 438, and the suggestion in the former case that “an express promise can only revive a precedent good consideration, which might have been inferred at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision, and was adopted.”

Now, it being laid down in the books that an express promise to pay a bill or note made by an endorser or drawer, after he is discharged by laches as having received no notice, or not in due time (which is equivalent), through neglect of the holder, will be binding upon him. Such a case must be treated as not within the rule ; and it may be so regarded, on the ground that like promises to pay by infants, discharged bankrupts, or insolvents—parties exonerated by the Statute of Limitations, &c.—on the principle that the holder is only barred by a legal maxim, but for which he might recover.

The rule requiring diligent and prompt notice of dishonour is one of adoption by the courts in furtherance of convenient policy, and certainly it is not inherent in the nature of an endorsement upon common law principles, as shewn by *Meggadow v. Holt*, 12 Mod. 15, 1 Show, 317, and *Holt*, 113, S. C.; *Tindal v. Brown*, 1 T. R. 167; *Bickerdike v. Bollman*, ib. 405; *Rogers v. Stephens*, 2 T. R. 713, Doug. 514, Chitty on Bills, 7th ed. 106-7, 245, 362; 2 Smith's Leading Cases, 22; *Love v. Wyndham*, 1 Mod. 535.

Although due notice has now become a settled doctrine, and virtually constitutes a part of the individual or implied undertaking of endorsers, unless excused or dispensed with on some peculiar ground, in the present case I find that the consideration was sufficient to support the express promise, as the plaintiff would have been entitled to recover on original or common law principles had not a legal maxim respecting notice of dishonour interposed, it being in the power of the party protested thereby to dispense with its operation.

If it were a case *inter vivos*, and the plaintiff admitted laches in giving, or the omission to give notice, but shewed that the intestate nevertheless promised to pay, his action would be maintainable. So, if he had made a will and left an executor, who after laches had promised to pay, or had an administrator been appointed before the note became due, and who after laches in giving notice had promised to pay—in all these cases the action would seem maintainable; and so it may be said *a fortiori*, when the laches were excused by the impossibility of giving any effectual notice, because there was no executor or administrator, and the administrator after being appointed had promised to pay the debt.

It is not a naked case in which no notice is averred, nor any excuse assigned for its omission as in 2 Doug. 679; *Williams v. Germaine*, 7 B. & C. 468; *Mitchinson v. Hewson*, 7 T. R. 348, 1 M. & R. 394.; for an excuse is shewn on the face of the declaration, though perhaps insufficient to dispense with any notice to raise an implied promise without more. But at the same time the count is not

framed in adherence to the forms that suggest excuses for not giving notice. And the cases mentioned, and indeed all cases in which defective counts on bills or notes have been demurred to for not sufficiently shewing due presentment or notice, but containing an alleged promise to pay, was susceptible, if the argument of such promises being express and supported by a sufficient consideration—for I do not think the words—"in consideration thereof," following an alleged liability to pay, refer only to such alleged liability, but rather to the *reason*, or the promises by reason whereof such liability is alleged to have accrued. And, notwithstanding such considerations, I cannot but subscribe to what late authorities lay down—that on demurrer, or in arrest of judgment, the promise must be regarded as express, if it cannot be implied from the premises stated, and the premises will support an express promise.

Deeming the consideration stated in this case sufficient to maintain the action, supported by an express promise to pay, I am led to the conclusion that the plaintiff is entitled to judgment. At the same time, it is a novel and nice point to determine, and I express such opinion with every diffidence and reserve.

I may add, that on the present impression, the count would be bad if the promise is not treated as an express one; in other words that it could not be implied in the absence of any averment of notice of non-payment, either at the former residence of the intestate, immediately after the dishonor of the note, or to the defendant as administrator, with due diligence, after his appointment. That a notice of non-payment, superadded to the other facts, would have raised an implied promise; and the express promise is equivalent to notice—as admitting knowledge of non-payment, and waiving or virtually dispensing with a taking notice;—so that, as said by Parke, B., in *Timmis v. Platt*, 2 M. & W. 721, the present cause of action is the existence of the note dishonoured under the circumstances stated, with the express promise of the defendant as administrator to pay the amount thereof.

The cases of *Rushton v. Arpinall*, Doug. 679-83, and

Williams v. Germaine, 7 B. & C. 468, are certainly against the count demurred to, unless the excuse alleged be sufficient to raise an implied promise in law; but the promises are then only implied on the face of the declarations, and late authorities seem to conflict with such an intendment on demurrer, when the facts stated raise no implied promise but will support an express one.

The court, on demurrer, cannot intend an alleged promise to be implied or express, unless they see that it is implied upon the facts alleged, in which event it will not be intended to be express; while if not implied, and the facts will sustain an express promise, it must be so regarded.

McLEAN, J.—On the argument, that portion of the demurrer relating to the uncertainty in the declaration, arising from the use of the initial letter in the name of the maker of the note, was given up, so that the only question is, whether the second count is good without any averment of notice of non-payment having been given to the intestate while living, or to the defendant since his death, or since letters of administration have been granted to him, or that such notice was given or left at the last place of abode, or domicile of the intestate. The mere indorsement of a promissory note not only passes the interest to the indorsee, but it also amounts to an undertaking that the note shall be duly honoured, and *that if it is not, and the endorser has due notice of the dishonour, he will pay the amount to the endorsee*. The simple writing the name on the back of the bill and handing it over to the endorsee implies this engagement, and an adequate consideration for making it. As the undertaking of an endorser is only to pay after default made by the maker and notice of such default, a presentment to the maker or at the place appointed for payment is a condition precedent, and the death of the maker will not excuse the neglect to make due presentment to his personal representative, whether executor or administrator, and if their be neither, then at the house of the deceased.—Chitty on Bills, 357. When presented for payment and default is made, the holder, if he intends to look to any endorser, must give prompt notice of presentment and

dishonour, in order that he may by such notice, be enabled forthwith to take the necessary measures against all parties liable to him to obtain and enforce payment; and, if such prompt notice be delayed, it is usually a presumption of law that the endorser has been prejudiced. In cases, however, like the present, such a presumption can scarcely be said to arise. The endorser died intestate, before the note became due, and it is alleged that when it became due there was no personal representative of his estate, and the inference intended to be drawn from that allegation is, that as there was no personal representative, there was no one to whom the prompt notice usually required could be given. As there was in fact no executor or administrator of the deceased when the note became due, there was no one who could legally act upon a notice of non-payment, or take measures to protect the estate from loss in consequence of the liability arising immediately on the maker's default. But on the appointment of an administrator, who must be assumed to be ignorant of any endorsement made by the intestate, until he receives notice, it may be very important that a notice should be given to such administrator, as promptly as possible, of the maker's default, and that the holder intended to look for payment from the assets of the estate.

The endorsement of the intestate formed a condite contract on his part, to pay the amount of the note when due, if not paid by the maker, *on receiving due notice* of presentment and non-payment; and as the administrator in reference to that contract, stands in the same position as the intestate, it seems but reasonable that he should receive a notice of non-payment as soon as practical after his appointment, in order that he may take measures to guard the interests of the estate against loss; and as the intestate was only bound to pay on receiving *due notice* of non-payment, and as such notice could not be given in consequence of his death, and there being no one to represent the estate until administration was granted to the defendant, it seems to me essential, that to entitle the holder of the note to enforce the conditional undertaking, a notice of non-payment by the maker

should be given to the defendant, and that it should be so stated in the declaration.

In Chitty on Bills, American edition of 1842, page 496, it is laid down, that "if the party be dead, notice should be given to his executor or administrator," and in a note it is added, "there are no English decisions to this effect," and a reference is made to a case decided in the state of New York, I believe reported in 17th Johnson's Rep. page, 25, where previous to the notes falling due, the endorser had died at sea, but the fact was not known to the holder, and no administration was granted for several months after the note fell due, and it was held that notice left at the last place of residence of the endorser in New York, and another sent to the residence of his family in the country through the post office, was sufficient, although no notice had been given to the defendants, the executors of the endorsers. In that case, the death of the endorser was unknown when the note became due, and the notices addressed to him at the residence of his family and at his last place of residence at New York, where if living, they would be most likely to reach him, were held sufficient, as indicating the intention of the holders of the bill to look to the endorser for payment. In that case too, the notice addressed to the residence of the family several months before the defendant took out administration, might very fairly be regarded as notice to the defendant, the presumption being, that all papers of the deceased would be handed over to the executor on being qualified to act.

In this case if a notice had been left at the last place of residence of the deceased, or left at the residence of his family when the note became due, I should incline to consider it as sufficient notice to the defendant as administrator, whose first duty on his appointment, must have been to take charge of all the papers and effects of the deceased, or, if a notice had been given to him without unnecessary delay, as soon as his appointment was known, it would equally suffice; but without such notice I think the action not maintainable. The deceased could not be sued or held liable without notice, nor do I see that his representative

can; and though notice could not be given when the note became due, there were strong reasons for giving it as soon as there was any one to receive it and entitled to act on it, and it by no means follows that it may be dispensed with altogether and the estate held bound without any means of knowing of the maker's default.

Under these circumstances, I should be inclined to consider the second count of this declaration bad, on the ground that it does not allege any notice, and, moreover, gives no sufficient reason for the omission. But there is at the latter part of the declaration an allegation which applies to all the counts—that the defendant as administrator, in consideration of the premises, respectively *promised* the plaintiff to pay him the several moneys in those counts mentioned, *on request*. If the facts stated in the count demurred to, were such that a promise in law to pay might be inferred from them, then this promise might be ascribed to these circumstances, and it might be regarded as an implied promise only. But the facts set forth do not raise such a promise, which would only arise on the default of the maker and the notice of such default; and as the allegation of a promise to pay cannot be overlooked or rejected, and cannot be looked upon as merely an implied promise, it must be taken that the plaintiff means to allege an actual promise, capable of proof, and such as he intends to prove upon the trial.

If the defendant then as administrator, has, notwithstanding any want of notice, undertaken to pay the amount, and the plaintiff is able to prove such an undertaking or promise, I do not at present see why he should not be at liberty to do so, and to recover the amount just as he would have done against the endorser under similar circumstances.

Taking then the general promise to pay the several sums of money mentioned to form a part of the second count, and to be an actual and not merely an implied promise, I think the plaintiff may recover on that count, notwithstanding the want of any allegation of notice of non-payment to the defendant, and the want of any sufficient excuse for not giving such notice—the alleged promise, if proved, being a

waiver of such notice, or an acknowledgment of its having been received.

SULLIVAN, J.—In the second count of the declaration in this case, the plaintiff, endorser of a promissory note, suing the administrator of the endorsee, avers presentment of the note sued upon, at the Bank of Upper Canada, where it was made payable, and non-payment. Then the count states, that the endorser, after the endorsement and before the note fell due, departed this life; and that at the time when the note became due no administration of his estate and effects had been granted. The declaration concludes with an averment that the defendant as administrator, in consideration of the premises, respectively promised the plaintiff to pay him the said several moneys on request. This count is demurred to—firstly, because of the use of an initial letter in the name of the maker John C. Spragg, to which objection I shall make no further allusion than that the like objection has been, in my opinion, properly overruled by the Court of Queen's Bench, in this province, with such a declaration of opinion, on the part of the court, that it should not now be renewed, except with a view to appeal, and I have only to repeat my opinion against the objection.

The second ground of demurrer is, that it is not stated that notice of non-payment was given at the domicile or last place of residence of the intestate, or to the defendant as administrator, after the letters of administration granted, or to the administrator after his appointment, and because no valid excuse is shewn for the omission of the notice. I have not been able to find any authority for the argument set up by the plaintiff's counsel, to the effect that notice is excused by the fact that when the note became due the endorser was dead, intestate, and that no administration was granted at that time. If I had to decide upon the validity of the objection alone, my opinion would be in favor of the demurrer—and it is to be observed that the counsel for the plaintiff, on argument did not rely upon the promise to pay, alleged at the conclusion of the declaration, or contend that it might be treated as an express promise; but it seems to me that we cannot declare a declaration

void because a good argument in its favor has been omitted to be advanced.

It seems clear from numerous authorities, that, before an action can be maintained against an endorser of a bill or note, merely upon the endorsement, and before an implied promise to pay the amount of the note upon request can be raised, the party sought to be charged must have had notice of two facts—first, of the non-payment, and, secondly, that the party seeking to charge him, looks to him for payment.

See *Solarte v. Palmer*, 7 Bing. 530; and S. C. in the House of Lords—1 Bing. N. C. 194; and particularly the judgment of the Court of Ex. Ch., delivered by Tindall, C. J., in the same case—1 Tyr. 376. In *Furze v. Sherwood*, 2 Q. B. 386, the doctrine of sufficiency of notice is much discussed; and in that case and the following one—*King v. Bickley*, 2 Q. B. 417—there appears an inclination in the court almost to dispense with the latter part of the notice—namely, that the holder looks to the party notified for payment. Notice of the dishonour of a bill is held, in the latter case, sufficient, while the case does not go so far as to say that mere notice of non-payment is sufficient. I take the law now to be, that notice of dishonour of a bill or note, coming from a party interested in giving the notice, is sufficient notice, by intendment, that the party giving the notice looks to the one notified for payment; but still, expressly or impliedly, such a notification, either expressed or intended, is necessary. I do not find that it has been held that any circumstances dispense with notice of some kind; and executors and administrators stand in the place of the original parties to the bill or note. A particular state of circumstances may make a notice given in one way, or at one time, sufficient, when the same would not be considered as due notice in another; but I do not find that notice, or the attempt to give notice, is dispensed with in any case.

But then, supposing a neglect to give notice of dishonour, is it not competent to the endorser to waive the right of taking the exception to the want of notice, by an express promise to pay, made after the laches committed, or before, if he chooses to waive the notice. The cases that shew

that a promise of this kind is binding are collected in Byles on Bills, 224-5, especially Chapman v. Annett, 1 C. & K. 552; McCuniffe v. Allen et al. 6 U. C. R. 377; 3 Bos. & P. 247, n.; and they establish that such a promise is not *nudum pactum*: indeed I do not see why it should be so, any more than a promise to pay a debt barred by the Statute of Limitations, or a promise by a certificated bankrupt to pay a debt from which he is discharged by his bankruptcy. The whole doctrine requiring notice is founded on a supposed possible or probable injury to arise to the party charged as drawer or endorser, from the want of his being placed on the alert to seek his remedy against those liable to him; and his promise after laches, in giving notice, may well be taken as an acknowledgment that he has not been injured by the want of notice.

If, then, an express promise be binding on the endorser and upon his personal representative, the question here is whether or not it is sufficiently alleged. The case of Rushton v. Arpinall, Doug. 679, and the case of Williams v. Germaine, 7 B. & C. 468, seem to favor the notion that it is not so; for in those cases, the declaration omitting to state that the defendant had notice, was held bad in arrest of judgment, when it might have been upheld if an express promise were good in the absence of notice, and if the common allegation of an *assumpsit* were considered as a good averment of an express promise. It is to be observed, however, that this point was not raised; it seems to have been taken for granted by the court as well as the counsel that the *assumpsit* was merely implied. The declaration attempts to shew no excuse for the omission to give notice, it merely states that the defendant, by reason of certain premises, became liable, and being so liable he, in consideration thereof, promised. I am not sure that any satisfactory distinction can be taken between that case and the present, although here an excuse for not giving notice is tendered, not sufficient to make the implied promise follow, and the defendant is said to have promised in consideration of the premises. In the cited case, the promise express after default in notice was not discussed; the doctrine belongs

perhaps to a later period; and I do not take the case to be strong against our present judgment. The case of *Eastwood v. Kenyon*, 11 Ad. & El. 438 to 447, shews in what instances express promises are supported by moral considerations when the defendant is discharged by statute or by rule of law—many authorities are there cited; and I think it appears satisfactorily that not only is there here good consideration for an express promise, but that the alleged promise may be taken on demurrer to mean an express one. It perhaps might be well if a rule of pleading were established which would enable a defendant to distinguish whether the plaintiff meant to rely upon an express or an implied assumpsit, but there is no such rule; and I take it to be established by *Masson v. Hill*, 6 U. C. Q. B. R. 60, and by *Cleal v. Elliott*, 1 U. C. C. P. R. 252, that where an express promise is or may be material, as in the case of an executor or administrator, it is traversable, and the declaration is not liable to demurrer, if the facts stated in the count are sufficient inducement to an express promise, though they may not be so to one merely implied.

The proper mode, in my opinion, for the defendant in this case to have raised the question which his counsel now argue, would have been for him to have pleaded non-assumpsit as to the alleged promise. So far as it related to the second count, his plea would have been good if there was not sufficient inducement in the count for an implied assumpsit; as the matter stands, I think he has placed himself in this dilemma. If the inducement be sufficient, then the count is good upon the supposition that there is no express promise. If the inducement for an implied promise be insufficient, then the count is good as containing the allegation of a promise which may be express, for which the inducement is sufficient. I think, therefore, that our judgment should be in favor of the plaintiff.

GILLESPIE ET AL V. MARSH, ADMINISTRATOR OF JAMES MARSH.

Pleading—Promise express or implied.

Assumpsit against an administrator upon a promissory note drawn by his intestate, who died before the note fell due. The count, after averring a due presentment and non-payment, continued, "of all which *due notice* was given by placing a notice of non-payment in the post office of the city of Toronto, (being the place mentioned in the said promissory note where the same was payable,) directed to" the intestate "at Richmond Hill, being the place where, before and until his death, he resided, and being his last place of residence." The plaintiffs further shewed that administration of the goods, &c., was afterwards granted to the defendant, and stated a resulting legal liability on the defendant's part, as administrator, concluding with an averment that the defendant "in consideration thereof *then* promised plaintiffs to pay them the amount of the said note on request." The defendant demurred specially to the declaration, on the ground that no notice of non-payment, or sufficient excuse for the omission of it, was averred. *Judgment* was given for the plaintiffs on the demurrer, for upon the assumption that the averments in the declaration as to notice were insufficient, the promise of the defendant, which must be taken to have been an express promise, was nevertheless, in the absence of any notice, supported by a good consideration, and bound him as administrator.

Declaration, 20th March, 1851, states that John C. Spragg, in the lifetime of James Marsh—to wit, on the 21st July, 1849—made his promissory note and thereby promised to pay for value received, three months after date, to said James Marsh or order, at the Bank of British North America in Toronto, 30%: that said James Marsh endorsed the same to the plaintiffs, and that he died before the same became due, intestate; and that when it became due no letters of administration had been granted to any person, nor had any person administered to his estate. The plaintiffs aver presentment on the 24th October, 1849, notice and non-payment; of all which *due notice* was given by placing a notice of non-payment in the post-office of the city of Toronto (being the place mentioned in said promissory note where the same was payable), directed to said James Marsh at Richmond Hill, being the place where said James Marsh, before and until his death resided, and being his last place of residence. Payment by any one is then negatived; and it is averred that afterwards, and after the said note became due—to wit, on 22nd November, 1849—administration, &c., was granted to defendant—by reason whereof, and by reason of the premises, he became liable, &c., and in consideration thereof promised plaintiffs to pay them the amount of the said note on request; yet, &c.

Special demurrer—causes assigned:

1. That the declaration shews James Marsh to have been dead before the notice of non-payment addressed to him was placed in the post-office.

2. That it is not averred that notice of non-payment was left at the domicile or house where he resided at the time of his death.

3. That no notice is alleged to have been given to defendant upon his receiving letters of administration, or in any manner given to the administrator of said intestate.

4. That the declaration does not shew any valid excuse for the want of such notice, or due legal notice.

John Duggan, in support of the demurrer, contended that a notice addressed to a dead person at the place of his former residence, and forwarded by post, was insufficient—*Byles on Bills*, 202-3-4, and other text-books pointing out that at least notice should be left at such residence, which could not be presumed of a letter merely sent by post and not alleged to have been pre-paid. Also, that no sufficient excuse for the omission of other service of notice appeared independently.

Crooks, for plaintiff, contended that what was alleged to have been done was equivalent to leaving a notice at the former residence of the intestate—and which all that can be found on the subject tends to shew was sufficient service of notice of dishonor, in the absence of any administrator. That there is no ordinary in the strictness; and that if there were, no authority is found for requiring service to be made upon him. That service at the place where the effects of the deceased may be supposed to have remained, affords the presumption that it was served by a person in charge thereof, and that it came to the hands of the administrator (with the other papers of the intestate) upon his appointment to the office of administrator. He referred to *Bank of Upper Canada v. Smith*, 4 U. C. Q. B. R. 483; 13 Jurist, 495; *Byles on Bills*, 320, as to service in case of bankruptcy, *ib.* 152; *Chitty on Bills*, 496-7; 1 Mood & Rob. 520, 544; *Story on Prom. Notes*, p. 376, s. 310.

MACAULAY, C. J.—The plaintiff's counsel did not rely upon promises to pay, as affording evidence by implication that notice has been duly served, or as founded on sufficient consideration in the facts alleged, to sustain the action as upon an express promise. No notice to the defendant as administrator is in general terms averred ; nor does it otherwise appear than by implication under the doctrine of relation, which was alluded to in the last case.—*Masson v. Hill*, 5 U. C. Q. B. R. 60.

The origin of the practice of granting letters of administration in England was stated by me in the case of *Beard v. Ketchum*, 6 U. C. R. 482-3 ; and although the statute 13 Edw. II. ch. 1, s. 19, made the ordinary answerable for the debts of the intestate so far forth as the goods would extend, &c., and liable to actions at the suit of creditors in respect thereof—*Plow. 277 a.*—as were also his deputies or committees ; yet any such proceedings must have been long obsolete, since the statute 31 Ed. III. ch. 11, provided for the granting of administration to the next of kin, &c., with power to sue for and collect debts due to the estate of the intestate.—*Cam. Digest Administrator, A 1. B. 1.*

The subject is very fully discussed and considered in 5 Moore's Cases Privy Council, 442-3.

That the governor of a colony is in some respects in the situation of ordinary.—See *Clark's Colonial Law*, p. 32 & notes, and p. 59 ; *West India Reports*, pages 74, 96, 149, 189, 225, 260, 280, 350, 382, 407.

But I do not find that notice of the dishonour of bills or promissory notes were ever given to the ordinary, though it probably might be done if the only alternative at a period prior to granting of letters of administration. It might be served on the next of kin who was *prima facie* entitled to administration, since statute 31 Ed. III. ch. 11 ; or the widow since 21 H. VIII. ch. 5, s. 3, which in connection with the rule that any intermeddling with the goods of an intestate, without taking administration, renders the party an executor *de son tort*—*Cam. Dig. Admr. C. ; Padget v. Priest*, 2 T. R. 97, which gives support to the cases said to have been decided in the State Courts of some of the

United States of America, and to what is said respecting the sufficiency of presentment at the former house or residence of the intestate.

In this country there seems no other practical course of serving a prompt notice open to the holder ; and a notice so served is an overt act, by which the holder indicates any intention to look to and hold the estate of the deceased endorser liable—anything beyond that may be excusable ; and if so, the law, upon the appointment of an administrator, would thereupon imply a liability and raise a promise to pay on request ; if so, it follows that no second notice need be given to the administrator upon his appointment—that is, within a reasonable time afterwards, or after a reasonable opportunity to the holder to have acquired or come to the knowledge of his appointment ; but if not, and even if a notice ought regularly to be given to the administrator when appointed, (which really seems the good sense of the thing, considering that notice is in the interim excused,) I am induced to think that a promise to pay, made by the administrator upon demand of payment, sufficient to dispense with the necessity for proving, and therefore for serving, such notice ; and consequently, that judgment should be against the demurrer.

SULLIVAN, J.—This case differs from that of *Brown v. Marsh*, Administrator, inasmuch as the count demurred to, contains an averment of a notice given, directed to the intestate after his death, at his place of residence, there being no administrator at the time the note became due. It is strange that hitherto we have no English decision directly upon the point, for there must have been numerous cases where drawers and indorsers have died during the currency of the bill or note, and where there has been no administrator ; I am inclined to defer to the American authorities on this point, cited in *Story on Bills*, and the same author on *Promissory Notes*, and with approval by Mr. Sergeant Byles—17 Johnson, 25 ; 2 Kane's Rep. 121 ; 5 Hill's N. Y. Rep.

I think a notice directed to the last place of residence of the intestate while living sufficient, though given after his death, there being no administrator ; and at present I should

feel far from the opinion that a notice given to the administrator in a reasonable time after the grant of letters of administration, would not be sufficient.

But at all events there is in this case, as in *Brown v. Marsh*, a promise averred, for which there is, in my opinion, a sufficient legal consideration, supposing the promise to be express—so that the count demurred to is good in law, in either respect. If the consideration alleged be enough to found an implied promise, or sufficient inducement for one express after laches, judgment should therefore be against the demurrer.

McLEAN, J., concurred.

MCKELLAR V. MACFARLAND AND KIDD.

The gaoler of a common gaol is bound to receive into and detain in the gaol, until released by lawful authority, a prisoner delivered into his custody by a constable on a charge of felony, without warrant; and may justify in an action for false imprisonment, without shewing what the particular felony was with which the plaintiff was charged.

Process issued 30th March, 1851.

Declaration 9th April, 1851. 1st count states that defendants on the 17th March, 1851, at the city of Toronto, in the county of York, with force and arms, assaulted plaintiff, and seized and laid hold of him, and with great force and violence pulled and dragged him about, and also imprisoned plaintiff, and forced and compelled him to go and caused him to be conveyed in custody through divers public streets, &c., to a certain common gaol in the city and county aforesaid, and then imprisoned, and kept, and detained the plaintiff in prison, without any reasonable cause whatsoever, for the space of twenty hours, at the expiration whereof, defendants compelled plaintiff to go, in company with divers men and women of ill fame, &c., to a certain police office, &c., and there kept him detained for the space of four hours, contrary to law, and against the will of plaintiff, under a false and unfounded assertion and charge that plaintiff had committed a felony, whereby plaintiff was injured, &c., and committed to pay the sum of 5*l.* in order to obtain his liberation.

2nd count states that defendants, on the 17th March, in in the year aforesaid, with force and arms, &c., assaulted plaintiff, and then again imprisoned him in a certain common gaol, for a long space of time—to wit, for twenty hours, contrary to law, and against the will of plaintiff, whereby plaintiff was not only greatly hurt, but also injured in his credit and reputation.

Pleas—1st. Not guilty.

2nd, to 1st count. So far as relates to the imprisonment of the said plaintiff in a certain common gaol, the said defendant Kidd says, that before and at the time when, &c., he was and is the keeper of the common gaol of the county of York, and that said gaol, before and at the time when, &c., hath been and still is the common gaol and house of correction of the said city of Toronto; and thereupon it became, and was the duty of the defendant, as the keeper of said gaol, to receive into the said gaol and keep and detain in prison all such persons as should be brought to the said gaol by any peace officer or constable of the said city of Toronto, charged with any offence or crime, and as well without as with warrant in writing, and to keep them imprisoned until removed or discharged therefrom by lawful authority; and that on the day and year in said first count mentioned, plaintiff was brought into custody of said other defendant, charged with having committed a felony (the said other defendant then being a peace officer or constable, in and for the city of Toronto), to said gaol, to be detained until examined touching the said offence; and that defendant as such keeper of said gaol, kept and detained plaintiff in prison for a short space of time, and until he was removed by said other defendant, being such constable as aforesaid, to be examined touching the said offence, as he, said defendant, so being such gaoler as aforesaid, lawfully might.

Demurrer to 2nd plea—causes assigned:

1st. That the facts therein contained constitute no answer in law to the imprisonment of plaintiff mentioned in the introductory part of said second plea, said defendant not having any authority to receive, detain, and imprison, as he

states in the said second plea he has by virtue of being keeper of the common gaol aforesaid.

2nd. That the fact of the said defendant being keeper of the common gaol gave him no authority to imprison plaintiff under the circumstances stated in the said plea.

3rd. That defendant in his said second plea does not confess all the imprisonment, which he attempts to justify, and that there is no identity established between the imprisonment attempted to be therein justified and that stated in the first count; nor is it shewn that they are the same trespasses.

4th. That there is no valid or lawful reason shewn for detaining and imprisoning plaintiff for examination, touching the said offence.

5th. Or that defendant had authority under the circumstances stated, to detain plaintiff without a warrant; nor is it alleged that he was brought upon a warrant or imprisoned upon any warrant whatever, the said other defendant not having any legal authority to imprison plaintiff under the circumstances without a warrant.

6th. That it is not stated by whom the charge of felony was preferred, nor the time or place when and where the same was made.

7th. That defendant has not stated in the said second plea, the acts of felony charged upon the plaintiff, or the species of felony charged upon him, or the acts wherewith the plaintiff was charged when brought to the said gaol, nor that the plaintiff was only imprisoned for a reasonable time for the purpose therein mentioned.

There was also another plea like the second, to which the causes of demurrer assigned, were similar to those above stated.

The demurrer was argued in Easter Term, 14 Vic. *McKenzie*, for the demurrer—*Dempsey*, contra.

MACAULAY, C. J.—The authorities seem to shew that in case of misdemeanor, a constable is only justified in arresting without warrant upon his own view, but that for felony, he may arrest upon the complaint of a third person not on oath, such person representing facts and circum-

stances of suspicion, which if true constitute a reasonable ground of suspicion; or that he may arrest upon facts and circumstances within his own knowledge amounting to just cause of suspicion; and that in either event he is justified; while a private individual arresting, himself, or giving a party into custody to a constable, charged with a crime, must in his own justification, plead or prove the facts and circumstances under which he acted, or on which he relies as constituting a defence.—*Mure v. Kage et al.* 4 Taunt. 34; *Beckwith v. Philby and others*, 6 B. & C. 637; 3 Cam. 420. But as respects the keeper of the county gaol, it appears that he is justified in receiving into prison without warrant and safely keeping till duly discharged, any person brought and delivered to him on terms by a known constable or police officer, charged by him with felony, although the nature of such felony or the circumstances of suspicion are not related.

Statute 4 Ed. III. ch. 10, enacted that sheriffs and gaolers should receive and safely keep in prison such thieves and felons by the delivery of the constables and townships, without taking anything (meaning fines and ransoms) for the receipt.

1 Hale's P. C. 589.—Where a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things: 1st. He may carry him to the common gaol (2 Ed. IV. ch. 6); but that is now rarely done. 2nd. He may deliver him to the constable of the ville, who may either carry him to the common gaol (vide 4 Ed. III. ch. 10), or to a justice of the peace, &c.

1 Hale's P. C. 595 & 610—For if a private person or constable arrest a man for felony and carry him to the common gaol (as he may do by law, 13 Ed. IV. 9, and the gaoler is bound to receive him by the statute of 4 Ed. III. ch. 10), if the person or constable that delivers him acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him escape, and yet there is no mittimus in that case, but a notice on terms. It is ruled in 10 Ed. IV.

176, that it is a good justification for a man in an action of false imprisonment to say that the plaintiff committed a felony, and shew what, and the defendant arrested him and delivered him to the constable, or he might have brought him to the gaol himself or by his servant, as is there agreed. He may carry him to the gaol, &c.—10 Ed. IV. 18.

Watchmen may apprehend night-walkers, and commit them to custody till the morning, and also felons and persons suspected of felony.—2 T. R. 61; *Lawrence v. Hedger*, 3 Taunt. 14; *Samuel v. Payne et al.*, Doug. 359; *Cald.* 291.

Now here the plea states that the defendant was keeper of the county gaol, and that the plaintiff on the 17th March was brought to the said gaol in custody of Macfarland, then being a peace officer and constable in and for the city of Toronto within the county of York, charged with having committed a felony, and delivered to the defendant as keeper of such gaol, to be by him detained until he should be taken and remanded therefrom for examination touching such offence, wherefore he detained him for a short space of time, and until he was removed thence to the police office mentioned in the declaration.

The statute 12 Vic. ch. 81, sec. 12, declares that the gaol of the county shall continue, and that the gaoler, &c., shall be bound to receive and safely keep until duly discharged, all persons committed thereto by any competent power or authority of such city.

As to the several grounds stated as causes of special demurrer, I think—

1st. That the facts stated do constitute an answer in law, to the imprisonment of the plaintiff mentioned in the introductory part of the second plea.

2nd. And that defendant being gaoler as stated, did give him authority to imprison the plaintiff under the circumstances stated.

3rd. The second plea only professes to justify the imprisonment of plaintiff in the gaol in the declaration mentioned, which it does. Anything beyond that, if anything

amounting to a substantive or independent trespass, depends upon the plea of not guilty. I do not find where the justification agrees with the declaration in time, place, and circumstances, that it is essential to add the averment *quæ sunt eadem*, or otherwise to allege the identity.

4th. Is in effect involved in the first and second causes, and is answered above.

5th. And that he was justified without a written warrant.

6th. It sufficiently appears that the charge was preferred by the constable. Whether the constable had arrested the plaintiff upon a charge of some other person or on his own responsibility, does not appear. Whichever it was, the gaoler was justified in taking charge of him upon the delivery of the constable charging him with a felony.

7th. I do not think it was incumbent on the defendant to state the act or species of felony, or the act wherewith the plaintiff was charged, or that he was only imprisoned a reasonable time. If justified as being gaoler, then the defence rests upon the broad ground that being keeper of the Queen's prison, and such prison being the common gaol of the county, he was authorized, if not bound, to receive all persons delivered into custody there, by a known constable of any city or town or township within such county.

That the imprisonment takes place on the responsibility of the officer who committed the party, and not of the gaoler who received him, because the officer was entitled to make use of the prison as a place of safe custody, and the defendant as keeper thereof, empowered to be aiding and assisting him in the premises.

Any unreasonableness or other matters *ex post facto*, that would render the defendant liable as a trespasser, should be replied.

SULLIVAN, J.—The substantial objections to the defence, set up in the second and third pleas by the defendant Kidd, are, that he was not as gaoler authorized to receive a prisoner from a constable without a warrant; or if so, that he was not authorized to detain the prisoner without communication of the particulars of the charge against him, or if he could so receive him legally, he ought to shew

that the prisoner was detained only a reasonable time before he was taken before a justice, or that there was a necessity for committing him, no justice being then sitting or conveniently accessible.

According to the authorities collected in 2 Hawk. pl. c. 115 ; 2 Hale, 75, 76.

It seems clear that all persons whatsoever who are present when a felony is committed or dangerous wound given, are bound to apprehend the offender, and every private person is bound to assist an officer demanding his help for the taking a felon, or the suppressing an affray, or apprehending the affrayers.

The causes of suspicion that will justify an arrest by a private person not present at the commission of a felony, are enumerated in 2 Hawk. p. c. 118 ; and it appears by s. 15 and the authorities cited, that the person making the arrest must himself be inclined to suspect the person to be guilty, whether he made such arrest of his own head or in obedience to the commands of a private person.

The case of Samuel v. Payne and others (Douglas, 359), cited in note 2, 2 Hawk. 118, shews that constables and their assistants are justified in arresting a man upon a given charge of felony, even if no felony has been committed. He that makes the charge is answerable.—Ward and Clayton, 34 pl. 76 ; 2 Hale, 84, 89, 91. In the case of Samuel v. Payne, the rule was said by the court to be inconvenient and narrow, which required a felony to have been actually committed before the officer would be justified in making the arrest without warrant, because if a man charges another with felony, it would be most mischievous that the officer should be first bound to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine, commit or discharge.

It appears then that a private person, and *a fortiori* a constable or peace officer, upon reasonable grounds of suspicion, may arrest without a warrant ; and that a constable or peace officer may arrest a person given him in charge, or against whom a charge of felony is made.

In 2 Hawk. 129, s. 7; it is said, that it seems difficult to find any case wherein a constable is empowered to arrest a man for felony committed or attempted, in which a private person might not as well be justified in doing it. But the chief difference between the power and duty of a constable and private person in respect of such arrests, seems to be this, that the former hath the greater authority to demand the assistance of others, and is liable to the severer fine for any neglect of this kind, and has no sure way to discharge himself of the arrest of any person apprehended by him for felony, without bringing him before a justice of the peace to be examined; whereas a private person having made such an arrest needs only to deliver his prisoner into the hands of the constable

It is laid down by Mr. Sergeant Hawkins in the same 2nd vol. c. 16, on Commitments, sec. 3, as follows: "It seems to be agreed by all the old books, that whenever a constable or private person may justify the arresting another, for felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person has as much authority in cases of this kind, as the sheriff or any other officer, and may justify such imprisonment by his own authority, but not by the command of another; but inasmuch as it is certain that a person lawfully making such an arrest may justify bringing the party to the constable in order to be carried by him before a justice of the peace, was much as the statutes 1 & 2 Ph. & M. c. 13. and 2 & 3 Phil. & M. c. 10, which direct in what manner persons brought before a justice of the peace for felony, shall be examined by him in order to their being committed or bailed, seem clearly to suppose that all such persons are to be brought before such justice for such purpose. And inasmuch as the statute 31 Car. II., commonly called the Habeas Corpus Act, seems to suppose that all persons who are committed to prison, are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable thereto, it is certainly most advisable at this

day for any private person who arrests another for felony, to cause him to be brought before some justice of the peace that he may be committed or bailed by him.

It is no doubt the duty of a constable or peace officer who makes an arrest for felony, at the first convenient opportunity to bring his prisoner before a justice of the peace, so that he may be bailed, discharged or committed; but supposing that he takes him in the first instance to the common gaol, the question that arises in this case is, whether the gaoler is not bound to receive the prisoner, said by the constable to be taken by him on suspicion or upon charge of felony, without inquiring into the particular nature of the charge, without knowing the person who prefers it, and without inquiring into the fact as to opportunity of taking the prisoner before a magistrate, and whether the gaoler is not bound to keep such prisoner until he is taken before a magistrate by the constable or otherwise, or until he is released upon habeas corpus.

The stat. 4 Ed. III. ch. 10, enacts that justices of gaol delivery shall punish sheriffs and gaolers refusing to take felons into their custody, from constables and townships, without being paid for such receipt.

It is said (see Hawkins, 177, s. 9; Dalton, c. 118) that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next general gaol delivery. But in other cases, it seems (see 2 Hale, 123, 20 E. 4 O. B. F., Imprisonment; 2 Hale, 81), no one is justified in detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing, as if the party be so dangerously sick that it would apparently hazard his life to send him to the gaol.—See stat. 5 H. IV. c. 10.

In *Beckwith v. Philby, Wilkes and Spicer* (6 B. & C. 35), Philby was high constable of Ongar in Essex; Wilkes and Spicer were constables of the same parish. Philby seeing some reason to suspect plaintiff of having stolen a horse, arrested plaintiff, and sent for Wilkes to take him to the watch-house, and, on Wilkes' arrival, desired him to handcuff the plaintiff. Wilkes took him to a public-house,

where he remained handcuffed during the night. On the following morning, Wilkes delivered him to Spicer, who took him to a magistrate. Littledale, J., who tried the case, was of opinion that the arrest and detention was lawful, provided the *defendants* had reasonable cause to suspect that the plaintiff had committed a felony. A verdict was found for the defendants, but liberty was reserved for the plaintiff to move to enter a verdict for nominal damages, if the court should be of opinion that the arrest and detention were unlawful. The court of Queen's Bench refused to interfere with the verdict.

Now in that case neither Wilkes who detained the prisoner, nor Spicer to whom he delivered him, were the persons suspecting. Wilkes received and delivered the prisoner, and Spicer received him just as the present defendant did; and surely there can be no distinction taken against a keeper of a common gaol, which would make him liable, where these parties were held not to be so.

In *Lawrence v. Hedger* (3 Taunton, 14,) the plaintiff, it appears, was, in the city of London, stopped by a watchman, who took him to the watch-house, where the *defendant*, a beadle, was in attendance, who asked plaintiff questions about his bundle, the answers to which inducing suspicion, he sent the plaintiff to the gaol—the Poultry compter—not charging the prisoner in his own name, but in the name of the constable of the night, who was not in fact in attendance. The stat. 10 Geo. III. for regulating the police of London, directs that watchmen apprehending persons shall carry them to the constable of the night, who shall carry them before a magistrate; and it was contended for the plaintiff that the power being given to the constable of the night only, the beadle had no authority to detain and imprison him. Mansfield, C. J., was of opinion that without the aid of this act, any watchman might detain the plaintiff and carry him to a constable, and that it would be the constable's duty to secure him, and of this opinion was the court: *Lawrence, J.*, citing *Rex v. Booter*, 864, the case of an indictment against a constable for suffering a street-walker, taken up by a watchman, to escape. *Chamber, J.*,

quotes *Samuel v. Payne*, cited above, which he says was an arrest in the daytime; but in the night he says it is the especial duty of these watchmen and other officers to guard against malefactors, it is highly necessary they should have such power of detention. We should be very sorry, he says, if the law were otherwise. Now this was a justification at common law. The plaintiff was sent to gaol; no felony was committed; the plaintiff was discharged; there was no warrant; the gaoler did not receive the prisoner from the constable who made the arrest, yet the gaoler was not even sought to be made liable—on the contrary, the conduct of all concerned seems to have met the approval of the court. See *Willson's Office of Constable*, ch. 2, pl. 98, the *Queen v. Tooley* (2 Lord Ray. 1296), where it was held manslaughter to kill a constable acting out of his jurisdiction, for the purpose of releasing a woman whom he had committed to prison as a street-walker.

See also *White v. Taylor*, 4 Esp. N. P. C. 80; *Hobbs v. Brunscumb*, 3 Camp. 420; *Nicholson v. Hardwicke*, 5 C. & P. 495; *Davis v. Russell*, 5 Bing. 354.

If a constable, upon reasonable charge of felony or other crime, for which a constable may arrest without warrant, refuse to arrest, he may be indicted and fined.

Brandling v. Kent (1 T. R. 60), is the most satisfactory case I can find in modern times as to the duty of gaolers. It was there held that the gaoler was bound to receive a prisoner tendered after the return day of the writ: Mr. Justice Buller observing—"Mr. Chambre has said that the gaoler would be answerable if the arrest were illegal on the face of it. I doubt that very much. It has been decided in the case of a pound-keeper (*Cowp.* 476), that he is bound to receive everything offered to his custody, and is not answerable, whether the thing was legally impounded or not. The gaoler was not answerable in this case. He should not have disputed the orders of the sheriff, and therefore we will not permit him to amend," &c.

An examination of the case in *Cowp.* 476, which is that of the pound-keeper, who was held not to be

obliged to justify and not to be a trespasser, the case does not altogether bear out Mr. Justice Buller's citation; for Lord Mansfield and Ashurst, J., both take the distinction between a gaoler and a pound-keeper. The former, they say, is *prima facie* a trespasser, and must justify; and Astin, Justice, says—"A gaoler must justify, because a prisoner cannot be delivered to him without a warrant. Therefore he must state a warrant. The distinction is plain between the two cases, as Lord Mansfield states it, but I think there is abundance of authority to shew that gaolers are bound to receive prisoners from constables without warrant; the constable's charge of felony is the warrant. The gaoler must, it is true, plead the justification, and it is not in the situation of a pound-keeper; but this does not shew that he is accountable for the want of ground for the arrest.

It was held by Lord Ellenborough, in *Wann v. Alexander*, (3 Camp. 35), that a gaoler who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the true person. This may be good law, but it does not come up to the present case. The warrant directs the gaoler to receive and detain one person, and may not justify his mistakenly receiving and detaining another; but it does not appear by the pleading in the present case, that there was any mistake in the identity; and the law, as laid down by Lord Ellenborough, is sufficiently hard upon gaolers, without extending the rule any further. Lord Ellenborough's ruling is said in *Sewell on Sheriff*, 60, to be at variance with the language of the court in the case I have cited of *Brandling v. Kent* (1 T. R. 60).

In addition to other causes of commitment without written warrant, being held justifiable, the case of *Davis v. Capper* (10 B. & C. 33) is very instructive. In the judgment of Bayley, J., he cites the case of *Rex v. Gooding* from *Burns's Justice*, where the question was submitted to the judges, whether a prisoner was in legal custody for further examination merely, but with no warrant, commitment or other written authority; and their lordships were

unanimously of opinion that such a commitment for a reasonable time was good ; and the prisoner was convicted and sentenced for aiding the party in custody to escape.— See also *Wright v. Court et al.*, 4 B. & C. 596.

The case of *Rex v. Booter* (2 Burr. 864) is remarkable for the expression of opinion of Mr. Justice Wilmot: “I think it a misdemeanor in the constable to discharge an offender brought to the watch-house by a watchman in the night, though without any positive charge”—the question being on an indictment against the constable for an escape. I can discover no authority or principle upon which a gaoler is entitled to refuse to receive into his custody, persons tendered without warrant by constables upon a charge of felony, or which makes it his duty to inquire into the particular nature of the charge or the grounds upon which it is preferred, or to ascertain if there be a justice of the peace accessible, before whom the prisoner can be taken, or to discharge the prisoner by his own authority if this be not done. The prisoner has his remedy by habeas corpus, if detained without a written commitment ; but the case will seldom or never arise when the prisoner is not taken before a justice of the peace or discharged before a writ of habeas corpus can be obtained. There is a wide difference between the power of a judge, before whom a prisoner is brought upon habeas corpus, and the discretion of a gaoler. I am glad to be able to come to this conclusion, for otherwise it seems to me the law would cast an intolerable burden upon gaolers, and would impose duties upon them quite inconsistent with their office. Those who make the arrests and commitments are answerable for their grounds of suspicion, or for neglect of duty in not taking prisoners before magistrates.

This disposes of the substantial objections to the defendant's pleas. The formal one raised on argument—namely, that the detention is charged to be for a long space of time, and the detention justified for a short one—is not sustainable.—See *Worth v. Terrington*, 13 M. & W. 781. Then the pleas are as to the detention and imprisonment in the count mentioned. But the plaintiff's counsel objects that the

pleas should have concluded with a formal *quæ sunt eadem*, in order to identify the imprisonment justified with the one complained of. The rule is laid down with great precision in 1 Chitty Pl. 581. When the plea necessarily states the trespass to have been committed at some other time or place than that laid in the declaration, it is proper immediately preceding the conclusion of the plea, to allege that the supposed trespasses mentioned in the plea, are the same as those whereof the plaintiff hath complained. But when it is unnecessary, and consequently improper to vary from the time or place mentioned in the declaration, the *quæ sunt eadem* need not be inserted. I do not see that it was necessary for the defendant in this case, to vary from the time or place mentioned in the count. The defendant is charged with keeping and detaining the plaintiff in prison in the common gaol on the 17th day of March for a long space of time—to wit, for twenty hours. The defendant Kidd, confining his pleas to the detention and imprisonment in the common gaol, justifies the same—to wit, until the 18th day of March. There is therefore no necessity for departure from the time or place mentioned in the declaration, and neither is there any.

I am of opinion that our judgment should be against the demurrer, as I do not find the pleas bad for any of the causes noted in the demurrer.

McLEAN, J., concurred.

Judgment against the demurrer.

PARKER AND WIFE V. ELLIOTT.

In an action of trespass for entering the plaintiff's close and digging post holes, and building a shanty, &c., and occupying the beach for the purpose of fishing. *Held*, that the Crown has the power to grant the beach to high water mark, and that the plaintiff was a trespasser, the patent having conveyed to the plaintiff the land to the waters of Lake Ontario. *Held also*, that no common law right exists to the public, to use the beach above high water mark for the purposes of fishing, when the beach has been conveyed by the Crown to a subject.

Trespass, *quare clausum fregit*.

1st count: For breaking and entering the plaintiff's close, being broken lot No. 24, between the 1st concession of the township of Pickering, and on lake Ontario.

2nd count : that defendant seized and took divers goods, &c., being on said close, and carried away and converted the same to his own use.

Pleas :—1st. Not guilty. 2nd. That at the several times when, &c., there was, &c., a public highway into, through, over, and along the said close, wherefore defendant justifies at the said time when, &c., passing over and along the said close, by and along the said highway, doing no unnecessary damage, *quæ sunt eadem*, &c.

3rd. That there was a certain common and public landing place from Lake Ontario, and a certain common and public fishing ground through, over, and along the said close in which, for all, &c.

4th. To 1st count ; not the plaintiff's close.

5th. To 2nd count : not the plaintiff's goods.

Replication.—1st. Similiter to 1st plea.

2ndly. To 2nd—traversing the alleged right of way.

3rdly. To 3rd—*de injuria*, to the country, &c.

4thly. To 4th—Similiter.

5thly. To 5th—Similiter.

The cause was tried before Mr. Justice McLean, at the Spring Assizes, 1851, held in and for the County of York, when it was admitted that the lot in question was included in a crown grant to Lieutenant G. Hill, dated the 14th May, 1796, of lands in the township of Pickering, described as follows :—Commencing within one chain of the south-east angle of lot No. 25, *on the bank of Lake Ontario*, thence north 16 degrees west to the front of the second concession, thence north 74 degrees east 61 chains, thence south 16 degrees east *to Lake Ontario* 238 chains more or less, thence westerly *along the bank of the lake* to the place of beginning ; being lots Nos. 22, 23, and 24, in the 1st concession, together with the broken lots 22, 23 and 24 between the 1st concession and the lake, containing about 1200 acres of land, exclusive of the usual allowance for highways. Also, an indenture made the 28th of May, 1839, between James Givens, Theresa his wife, and Saltern Givens of the one part, and Margaret Parker, wife of Reuben Parker of the other, whereby the said parties of the first part, in consi-

deration of 346l., granted, bargained, &c., unto the said Margaret Parker, her heirs and assigns in fee, all and singular those parcels or tracts of land in the said township of Pickering, containing by *admeasurement* 268 acres of *land uncovered with water*, being composed of lot 24 in the 1st concession, and the broken lot No. 24 between the 1st concession and the lake, in the said township, butted and bounded as follows: Commenceing within one chain of the S. E. angle of lot No. 25 *on the bank of Lake Ontario*, thence north 16 degrees west, to the front of the 2nd concession, thence N. 74 degrees 20 chains, thence S. 16 degrees E. *to Lake Ontario*, 190 chains more or less, thence westerly *along the bank of the lake* to the place of beginning.

The township of Pickering lies on the north side of Lake Ontario, which washes its southerly front. The concessions are numbered from the front or south to the rear or north, that next the lake being called the broken front, and the lots are numbered from east to west. The alleged trespass was committed on a strip of land above the water level, which crosses the fronts of the broken front lots Nos. 23, 24, and 25, and separates the waters of Lake Ontario from a sheet of water within, now called Frenchman's bay, which bay and strip of land the plaintiffs contend, form parts of the aforesaid lots. The principal question at the trial was, whether that portion of the strip of land in front of No. 24, was included in the grant of the said lot to Lieut. Hill, and in the deed from the Givenses to Mrs. Parker.

One of the witnesses, a deputy provincial surveyor (Shier,) stated that the broken front of Pickering had not been surveyed in the original survey of that township, but that the lines had been run by a deputy surveyor of the name of Galbraith, under the direction of government, at what time not being stated. This witness proved a copy of the original plan of Pickering in the Surveyor General's office, in which the lines are extended through Frenchman's bay to the shore of Lake Ontario. Shier also made a survey for the plaintiff in June last, and he stated that the east line of No. 23 had been run by Galbraith, and that from that line he measured on the beach westerly the

width of No. 23 and found his line to correspond with the east line of 24, as run by Galbraith, north of Frenchman's bay; that he then measured across No. 24 on the beach, and placed a post on the limit between No. 24 and the road allowance between Nos. 24 and 25, but no such allowance is indicated on the plan; that he chained between 23 and 24, and found the measurement to correspond precisely with the original survey; that the strip of land in front of the bay, in No. 24, is four chains across from the water of the bay to the lake, of which 2 chains and 25 links are beach and 1 chain and 75 links marsh, but that it is not uniformly so, varying according to the depth of the water; that there was no outlet from the bay to the lake when he surveyed, although an outlet is indicated on the government plan at lot No. 22; it was also in evidence that sometimes there was an outlet and at others not; that the bay is half a mile wide from south to north, or in front of No. 24, and that the beach in front of No. 24, is inaccessible except by water, or by going round by other lots on the east or west; there was also evidence that there is a bank at S. E. angle of No. 25, which is 20 or 30 feet from the water, and about 24 feet high, against which the waves beat in stormy weather; that there is also a bank on the eastern extremity of the sandbar or beach, about 12 feet high, apparently on Lot No. 21, and which is fenced by the occupant to the edge of such bank; that this bay was known to be open as far back as the year 1812, and for twelve or thirteen years afterwards, and accessible for batteaux and boats; that at that period the waters of the lake washed into the bay through an entrance near the centre half a mile wide—in short, over and across the spot where the defendant was proved to have erected a shanty or fishing hut. Other evidence was given, although not so strong, to the effect that the entrance was not practically open, but that a channel was formed and sometimes closed; that the level of the lake had been known to vary four feet in some seasons as compared with others, and that in stormy weather, the waters washed up as high as the defendant's shanty, and a little beyond it, the land behind it being rather higher, the highest level of the

beach being about four feet above the water's level, which level some called the bank, and up to which the water washed in high water or stormy seasons; others said that in the spring and autumn, the waters in the bay rise and force a passage through to the lake at differing and varying points, but sometimes deep enough to admit the passage of a sailing vessel from the lake; that the beach had undergone little change for the last twenty years, and that there are small trees and coarse grass growing on it; also that the owners of the lots adjoining on the east and west, claim the beach in front as portions of their lots, and had apparently done so from the beginning, but there was no specific proof of uninterrupted and undisturbed enjoyment or possession as of right in any particular manner, nor was there except as above, evidence particularly describing the nature of the coast, or the height of the banks in front of Pickering to the east and west of 24, nor of the descriptions of other government grants of the broken front. The plaintiffs relied principally upon the descriptions contained in the government patent to Lieut. Hill, and the government plans, together with evidence of actual possession. In support of the imperfect paper title of the plaintiff's, evidence was given with a view to shew actual possession of the *locus in quo* as part of lot No. 24, to the following effect: That as far back as 1831 a brother of the plaintiff was on the lot improving it for him; that some men had cut 500 cords of wood on it for him 19 or 20 years previous to the year 1851; that the wood was drawn out and placed on the beach in front of the lot (i. e., on the *locus in quo*), whence it was carried away in vessels; that for some years back he had allowed a person named Goodwin to use this beach in carrying on the operations of fishing, for which compensation was made in fish, and that he (Goodwin) had erected a small shanty on it, &c.

That plaintiffs had put up a notice on the *locus in quo*, forbidding trespassing; that plaintiff had been seen frequently on the lot; that he lived on No. 24, in 1st concession, and cut wood on the broken front and carried it across the beach, &c., but the beach was never enclosed by fencing or the like.

3rd. To shew a trespass by the defendant, it was proved that in the autumn of 1849 and 1850, the defendant had used the beach in front of No. 24, as a fishing ground; that he erected a shanty or building upon it and dug holes in the ground and planted posts for that purpose; that the posts were about 20 or 24 yards from the lake; that the shanty was used partly as a lodging and partly as a cooper's shop, and that the defendant had 14 men in his employment, and that great numbers came there to buy fish; that defendant claimed a right to be upon the premises up to the utmost extent to which the lake had risen, and that he had as good a right there as the plaintiff, although plaintiff had prohibited the defendant's erecting the shanty or occupying the beach.

In short, there was no doubt of the defendant's having trespassed on the *locus in quo*, if it was the plaintiffs' close.

At the close of the plaintiffs' case the defendant's counsel moved a non-suit, on the grounds—

1st. That the plaintiffs had not shewn such a possession as entitled them to maintain trespass, either by virtue of title or actual occupation, the deed from the Givenses not establishing any title under Hill, and none being proved, otherwise. The application was however refused. The defendant then relied on the three-fold defence—

1st. That the beach was not part of lot No. 24.

2nd. A public right of way across the same.

3rd. A right to use the same as a landing-place in the exercise of a public right of fishing in front thereof, as against which right the Crown could not grant it, although it might compose part of lot No. 24.

2nd. In support of a plea of a public right of way, the defendant gave evidence to shew that when the entrance into the bay had been closed up, and a continued line of beach formed, people from the interior had been in the habit of passing along it with horses and waggons, &c., drawing wood, fish, and other loads, &c., but some witnesses denied that there was any thoroughfare or common travelled road.

3rd. As to the right of fishery, there was general evidence

that fish could be caught at certain seasons in front of the beach in question, and that persons were in the habit of fishing there and of passing and re-passing and landing, &c. on the beach in following such pursuit.

The case was left to the jury under a charge favorable to the plaintiffs, and they found for them on the 1st count with one shilling damages, and for the defendant on the second count.

In Hilary Term, 14 Vic. (February, 1851,) *James Boulton*, for defendant, obtained a rule calling on the plaintiffs to shew cause why such verdict should not be set aside and a new trial had, as being contrary to law and evidence, and for misdirection, and for the reception of improper evidence, without costs.

Hector shewed cause in the same term.

For the defendant, it was contended that the description contained in the patent and in the deed from Givens to Parker did not embrace the *locus in quo*, and if they did that, it is a highway or public right, and not grantable.

For the plaintiff, it was submitted that on the evidence the right of way or of fishery, as pleaded in the second and third pleas, did not arise; that the second plea was unsupported by proof, and the third, not in the matter of it any defence, so that if found for defendant, the plaintiff would have been entitled to judgment *non obstante veredicto*.

That the description did include the beach, and that to lake Ontario means to the waters thereof—citing *Moffat v. Roddy*, 2 U. C. Q. B. R.

That the Crown could and did grant to the water's edge. *Bundell v. Caterall*, 5 B. & Al. 268; *In re the Hull and Selby Railway Co.* 5 M. & W. 327; S. C., 8 C. B. 353; *Calmady v. Rowe et al.*, 6 C. B. 861.

That the plaintiff gave sufficient evidence of possession as against defendant.—*Duke of Beaufort v. Mayor of Swansea*, 3 Ex. R. 433; *Jones v. Williams*, 2 M. & W. 325, and *Calmady v. Rowe et al.*, 6 C. B. 861.

That there was no evidence of a right of way or to land in fishing &c., and if so, no right to dig holes on part of lot No. 24.—*Moffat v. Roddy*, supra; 13 Jurist, 713; *Baggott v.*

Orr, 3 B. & P. 472; Gray v. Bond, 5 Moore, 527; S. C., R. B. & B. 667; Attorney General v. Parmenter, 10 Price, 378.

That no objection was made to the learned judge's charge; that the only misdirection complained of is, as to the proof of possession, in the absence of proof of right in the Givenses to convey, but that there was (as ruled) ample evidence as against a wrong-doer.

Boulton, in reply, contended that the deed under which plaintiffs claimed, expressly excepted land covered with water, and virtually excluded the beach in question, and relied on the evidence of his witnesses in support of the conclusion that it was not granted to Hill, or possessed by plaintiffs, the evidence of possession being insufficient in the absence of proof of title.

That the bay was open into and formed part of lake Ontario, and was capable of being made a commodious public port or harbour; that the place of starting, in the description, being on the *bank* on the west, the line could not be carried across the bay and down to the water's edge on the east side of lot No. 24.

That in the government plan the bay is designated as a mere marsh, but being in fact a bay or harbour, the Crown was deceived, and the grant void; or that if formed gradually since the grant, it deprived the owner of No. 24, of the land covered with the waters of the bay, which thus by accretion (as it were) became public right.

That the owner of No. 24 cannot claim the beach by accretion, not being formed from the main shore, but rising in fact out of the lake and forming a bay within, in front of No. 24 and the other lots.

That it was used as a highway 35 years ago according to some of the witnesses, and as adjoining a fishery on the lake shore, the public had an easement therein and a right to use it for the purposes of fishing, as defendant did. He cited *Taylor v. Parry*, 1 M. & G. 604.

As to possession he submitted—

1st. That there was no proof of possession or of title.

2nd that the plaintiffs' deed did not embrace the *locus in quo*.

3rd. The plaintiffs were not entitled by accretion.

4th. That there was a public easement as a highway in common with lake Ontario, which was a great highway.

5th. Or as adjoining the fishery.

MACAULAY, C. J.—1st. With respect to the evidence of possession, I think it sufficient if the beach formed part of lot No. 24, but not otherwise.—*Doe dem. Barrett v. Kemp*, 2 Bing. N. S. 102; *Jones v. Williams*, 2 M. & W. 326; *Woolway v. Rowe*, 1 A. & E. 114; *Roscoe's Ev.* 35, and *ib.* 501; *Elliott v. Kemp*, 7 M. & W. 312; 2 B. & B. 403; 5 Moore, 185; *Taylor v. Parry*, 1 M. & G. 604.

2nd. Whether the breach forms part of the broken front of lot No. 24, it depends upon two considerations—

1st. Whether it is actually embraced in the description of the grant to Hill, and if so—

2ndly. Whether it was a public property which the King could not grant, or was deceived in granting.

The present case does not involve any claim to navigate or use the waters within the beach or bar, or to land upon or use the shore or bank bounding the bay or pond on the north; and restricted on the beach, it is necessary to distinguish between the *lake shore*, properly so called, and the land (whether a bank or slope) adjoining, but lying beyond or above the shore.—1 Mar. 313; *Miles v. Rose et al.* 2 B. & B. 403.

It appears to me the *locus in quo* does form part of lot No. 24.

The description in the grant to Lieut. Hill commences at the south-west angle of this lot *on the bank of lake Ontario*, and then gives the course of the westerly side line. In the easterly side line of No. 22, it runs *to the lake*, and thence westerly along the *bank* of the lake to the place of beginning. It is evident, therefore, that “*the bank of the lake*” and “*to the lake*” are treated as of similiar import, and that from the *lake* a line may be run westerly along the *bank*.

Referring then to the case of *Moffatt v. Roddy* in the U. C. Q. B. R. and to those hereafter cited, it will be found that the *ripa* or bank, as intended in this patent, must be taken to mean the land line defined by the highwater mark.

If we refer to dictionaries, we find bank explained to mean the earth arising on each side of the water, that we say properly the shore of the sea and the banks of a river.—Johnson's Dictionary.

In the case of *Blundell v. Catterall*, 5 B. & Al. 268, (which determines that the public had no right of bathing in the sea, and as incident thereto, of crossing the *sea shore* on foot or with bathing machines for that purpose,) we find the legal import of the word *shore*. At page 275, Best, J. (who differed from the other judges,) speaks of the shore or beach as synonymous. Johnson, in his dictionary, defines beach as the shore, particularly that part that is dashed by the waves, and defines the strand as the verge of the sea or of any water.

At page 291 the shore is defined as the land between the high and low water mark at ordinary tides, or between the ordinary flux and reflux of the sea.—See also pages 292, 298, 304; Hale *de jure maris*, chapter 4, at page 301, Holroyd, J., speaks of the sea shore when covered with water. At page 303 he speaks of the *ripa* or bank, which at page 308, Bayley, J., says applies to rivers or ports, and probably also to the land above the high-water mark.

At page 286, it is said Lord Hale makes the distinction between the shore of the sea and the banks of a river, and at page 312 Abbott, C. J. says, it may be admitted that whatever is true of navigable rivers and their banks may be true of the sea and its shores.

And the case of *Ball v. Herbert*, 3 T. R. 261, decided that the public were not entitled at common law, to tow on the banks of navigable rivers. The latin word *ripa* is rendered as the bank of a river, and Johnson's dictionary says, shore properly means the coast of the sea, but that it is applied to the bank of a river, which is a licentious use of it. Kellam's Dictionary of the Norman or Old French language gives *ripas de l'ewe* as by the water side, or banks of the river.

In *Webb v. Richards*, 10 Law Journal Q. B. 204, Coldrige, J., said, the beach or shore included that which lay between ordinary high and low water marks, and that these must be taken to mean the intermediate tides between extreme

spring and extreme neap.—See 1 Q. B. 439, S. C., in which however, the charge of Coldrige, J., who tried the cause, is not stated as it is in the Law Journal. In the matter of the Hull and Selby Railway Co., 5 M. & W. 327, the shore is termed the *foreshore*.

In *Calmady v. Rowe* and another, 6 C. B. 861, at page 885, it is said the ordinary neap tide is the boundary of the *littus maris*. *Smith v. Her Majesty's Officers of State for Scotland*, 13 Jur. 713; S. P. Wilcock's *Law of Waters*, 20, 21; Bull's *Law of Scotland*, page 169, sec. 643, that lands bounded by the sea or sea shore are alike, and both extend to low water mark—that is, include the shore subject to the public easement for purposes of navigation and to fish.—5 Co. 107; Dav. R. 56; 5 Ba. Ab. 498.

See the provincial statute 12 Vic. ch. 81, schedule C., the description given of the cities of Hamilton, Kingston, and Toronto, in which the terms “margin of the marsh,” “margin of the water, water's edge of lake Ontario,” “low-water mark,” “shore,” margin of the water on the shore of lake “Ontario,” “shore of lake Ontario,” “easterly shore or water's edge of the river Don,” “to the river Don,” &c., are used.

The meaning of the term “bank” was also much discussed in the cases arising out of the disputes respecting the reservation of one chain on the top of the bank at the Niagara Falls—*Clarke et al. v. Bonnycastle, &c.*; but there the question was attended with peculiar circumstances, and it turned on the fact of the original survey.

That the sea shore, subject to the public easements above mentioned—that is, for purposes of navigation and to fish—may be granted by the Crown, seems clear on the following authorities:—*Scrutton v. Brown*, 4 B. & C. 485, 6 D. & R. 536, S. C.; *The Attorney General v. Parmenter*, 10 Price, 378, 411; *Parmenter v. Attorney General*, 10 Price, 412, 464; *Lopez v. Andrew*, 3 Man. & Ry. 329; *Chitty on Pleadings*, 173, 207-8; *Angell on Water Courses*, Appendix 90; *Hooker v. Cummings*, 2 Jo. 90, Appendix 151; *The People v. Platt*, 17 Ju. 195; *Calmady v. Rowe* and another, 9 C. B. 886, 894 and note; *Duke of Beaufort v. Mayor of*

Swansea, 3 Ex. R. 433, mentioned in 6 C. B. 895 note; *Rex v. Russell*, 6 B. & C. 566; 9 D. & R. 566; 1 All. & Nap. 348, Irish.

The elaborate discussions contained in the foregoing cases, shew I think clearly, that "to the lake" or "the bank of the lake," means to high water mark, and consequently the southern boundary of the grant to Lieut. Hill was the high water mark or bank of the lake. In many situations, I doubt not, a defined line caused by the wash of the waves in ordinary weather is made, indicating a high water mark as compared with the lower level in calm weather or low water, although the terms high and low water marks are usually adopted in relation to tide waters; and I consider that by the bank, as used in this description, must be taken to have been intended the ripa or land above the high water line—*Calmady v. Rowe* and another, 6 C. B. 888. Bayley, J., in *Dickens v. Shaw*, cited *ib.*, and *Blundell v. Catterall*, 5 B. & A. 268, whence it follows that the bar or sand bank in question, along and above the high water line, must be regarded as the southern boundary of lot No. 24.

It was contended, that even if so intended, still the bay within formed part of the lake, and that the sand beach which formed it could not be granted, or was granted improvidently. This sheet of water has acquired the name of Frenchman's Bay, but when the bar is entirely closed, it is a mere pond or pool, and I do not think it can be properly considered a portion of lake Ontario any more than the marsh of Coot's Paradise at Hamilton can be called a part of Burlington bay or of the lake.—4 Inst. 140, citing 43 E. 3 Norff, recorded in M. 15 and 16 El.

The case was, that the Abbot of Ramsey was seized of the manor of Brancaster in Norfolk, bordering upon the sea, upon 60 acres of marsh of which manor the sea did flow and re-flow, and yet it was adjudged parcel of the Abbott's manor, and by consequence within the body of the county unto the low water mark—Dyer, 326 b. No. 2; and it was adjudged—Pasch. 17 El. in the Exchequer—Diggs being plaintiff—that the land between the flowing and re-flowing of the sea belonged to the land of the manor adjoining.

So on the same principle, the marsh, bay, or pond, and the sand bank or bar in the present case, may be parcel of the township of Pickering.—1 Ceb. 508, 522 ; 1 Sid. 148, and Al. 10 ; Chad v. Tilsed, 2 B. & B. 403, S. C. ; 5 Moore, 185.

The proprietors of certain lands on the sea coast having, forty years before, with a view to reclaim the sea mud, ran an embankment across a small bay which was used to be left almost dry at low water, and having ever since asserted without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest, it was held that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it and to establish the right asserted.

The bed of the bay or pond is not left dry at low water, as appeared in that case ; but here there is a grant from the Crown expressly shewn, as was there presumed, and the principle of that case seems to me applicable to the present. Calmady v. Rowe and another, 6 C. B. 855 ; Constable's case, 5 Co. 107 ; No. 2 Whit, 134, 166, 167, 280 ; Miles v. Rose, 1 Mar. 313 ; S. C. 5 Taunt. 705, is also material. There much stress was laid upon the flux and re-flux of the tide ; and the cutting of reeds and navigating the creek or water with pleasure boats, was held evidence for the jury that it was a public navigable creek, &c., and they found that it was. The court refused to disturb this verdict, but had it been the other way it would have been equally suffered to repose.

The question of right by *accretion* does not seem to me to arise. In relation to that point, I may mention —Rex v. Lord Yarborough, 3 B. & C. 91 ; S. C. 5 Bing. 163 ; 2 Blis. N. S. 147 ; 1 Dow. N. S. 178 ; In re the Hull and Selby Railway Co. 5 M. & W. 327 ; Sal. 561, No. 3.

Looking at the description and contents of the grant, and the government plans by which the description was probably guided, and the evidence, I find no good reason to suppose the government improvident.—Sal. 561 (3) ; Regina v. Boucher, 3 Q. B. 649. It was manifestly intended to include the bay or pond ; and unless it were clearly shewn to form a portion of the lake, over which the public had an

easement or right to navigate at least, if not to fish, and which right could not be destroyed by such a grant, I do not think the argument of the King being misled or deceived as to the real nature of this water can prevail; and even if it really constituted a portion of the lake, as an inlet or bay, and fed thereby, it does not follow that the soil could not be granted, subject to any public easement that might exist in relation to the use of the waters covering the soil. But that is not the question. It is, whether the belt of sand which separates the lake from, and forms this bay or pool, is grantable above the high water line; for if so, it is granted, and intentionally granted. As to a public right of way, I find no sufficient evidence thereof.

The only remaining question is, whether the defendant had a right to land upon and use the *locus* for the purpose of *fishing*.

It may be assumed that the public have a right of fishing in the lake in front of lot No. 24. That is not the question, and it is unnecessary therefore to decide it.

It does not follow that such right confers, as incident thereto, a right to land or use the bank (being private property) above high water mark, in the pursuit of fishing, much less to dig holes or erect buildings thereon. The law on this subject will be found in the following books and cases:—Wilcox on Waters, 21, 128–30; Schultes on Aquatic Rights; Lord Fitzwalter's case, 1 Mod. 105; Ward v. Creswell, Willis, 265–8; Warren v. Matthews, 6 Mod. 73 and note; *ib.* 163; 1 Sal. 357; Carter v. Murcott and another, 4 Bur. 2162–3; Bagott v. Orr, 2 B. & P. 472; Weld v. Hornby, 7 East. 195; Gray v. Bond, 2 B. & B. 667; 2 Saund. 175 (a); Ball v. Herbert, 3 T. R. 261; 4 T. R. 437; 1 H. B. 182; Mayor of Oxford v. Richardson, 1 Anst. 231; Moffat v. Roddy, U. C. Q. B. R.; Angell on Waters, 151, 153; Kent's Com. 333, 347.

I perceive no proof of enjoyment or use sufficient to confer a right as by prescription, nor do the facts appear to me to create a question rendering it necessary to go into the cases on the subject.

I am of opinion therefore on the evidence—1st. That the

locus in quo is above the high water mark—in other words, forms part of the bank of the lake within the meaning of the description contained in the government grant, and that it is embraced in such description.

That the plaintiffs gave sufficient evidence of possession thereof, as against the defendant; that no public right of way or user above high-water mark is shewn, either as a highway or land road, or to be used in the operations of fishing; and that whether there be a public right of fishing in front of the lot, and an easement to use the shore or space below the high water line, are immaterial, as the jury must be taken to have found that the *locus in quo* formed no part of the shore thus defined and limited.

It becomes unnecessary to consider whether, at all events, the defendant could justify digging holes, &c., even if a public easement as a fishing ground did exist, when the soil of the *locus in quo* was a part of the plaintiff's close or lot.

The issues on the second count being found for the defendant, it is unnecessary to consider whether husband and wife could properly join in such a cause of action as is therein stated.

SULLIVAN, J.—I am of opinion that the verdict for the plaintiff should be allowed to stand.

Under the first issue, on the plea of not guilty, the plaintiff was bound to prove a trespass within broken lot 24, between the 1st concession of Pickering and lake Ontario; and under the fourth issue, on the plea that the close was not the close of the plaintiff, he was obliged to shew possession of the place when the trespass was committed. It was objected at the trial that the plaintiff did not prove title to the lot in question, and, so far as a paper title went, he certainly failed, for he proved a patent from the Crown, issued in the year 1796, granting this lot with other land to Lieutenant George Hill, and then a conveyance from James Givens and his wife and Saltern Givens to the plaintiff's wife, without shewing any connexion between the grantee in the patent and the grantors in the conveyance to Margaret Parker. The patent therefore is only of value to shew the boundaries of the broken lot 24, and the

conveyance to the plaintiff's wife was evidence to establish the point that his possession was under a claim of title to the whole of the lot, and that a possession of a part was intended to be possession of the whole.

As regards title, I think there can be no question in this case. Acts of ownership are proved in the locality of the trespass, and possession in the rear portion of the lot, which is ample title as against a mere wrong-doer. The difficulty in the case arises in the application of the description by abuttals contained in the patent to the ground on actual survey, as the defendant contends that the place in which the alleged trespass was committed was no part of the broken lot No. 24.

The description of the land, according to the patent, commences within one chain of the south-east angle of lot 25 on the bank of lake Ontario. The first line of boundary of the tract described, runs northerly from the lake; the second or rear line easterly; the third or returning side line southerly, *to lake Ontario*; the fourth line runs westerly along the bank of lake Ontario to the place of beginning.

In front of the lot 24 is a pond or body of water called Frenchman's bay, between which and the open lake is formed a sand bank or spit of land, extending from high land on No. 25—the lot west of the plaintiff's lot—easterly to high land east of the plaintiff's lot, and closing the mouth of what at some remote period was a bay or indentation of the land. This bank appears to be formed of the shingle sand and other wreck of the cliffs washed by the waves of the lake, gradually deposited across the mouth of what was once the bay, and when perfect forming dry land a few feet above the level of the water from one point to another, continuing the line of coast in the direction it would have taken had there never been any indenture of the land. It is represented as being liable to be broken through by high waves of the lake in storms, and by the pressure of the waters of the bay when they are high, so as to form an opening into the lake, varying in position and in width according to the circumstances for the time causing the breach, and filling up again gradually by the deposit of

shingle and sand ; thus when the spit of land is completed there is a perfect lagoon or pond inside, and when there is a breach, the pond has an opening into the lake, said sometimes to admit of the passage of batteaus, or even larger vessels. There is no evidence to shew the condition of this locality in the year 1796, or any reason to suppose that the character of the lagoon or bay was different from what it is at present. So far as I can learn, the lot was not surveyed on the ground, previously to the issue of the patent, but the lines were afterwards run by a surveyor named Galbraith, by order of the government. John Shier, a surveyor employed by the plaintiff, swears that he chained the line between 23 and 24, and found it to correspond with the original survey. I am at a loss to say whether he means that the length of the line did or did not correspond with the distance given in the patent—i.e. 238 chains from front to rear of the tract contained in the patent, including the bay and the spit of land in front—or whether he ascertained that point. The plaintiff's counsel contends that the description in the patent covers the spit of land mentioned in the evidence, and upon which the trespass complained was committed ; that the words "bank of the lake" and "the lake," as applied to the facts of the present case, designate the same boundary ; that the pond of water cannot be said to be the lake, or its northerly shore the bank of the lake ; and therefore that the spit of land is included within the broken lot, as described in the patent, of which the plaintiff proved himself to be in possession. On the part of the defendant, it is argued, that the bay evidently at some period was part of the lake ; that it becomes so now when the barrier happens to be broken through ; that the spit of land must be looked upon as an accretion of land which probably may belong to the owners of the adjacent lots, from each of which the land is continued across the mouth of the bay, but not to the broken front of lot 24. He further contends, that his view is confirmed by the description in the conveyance to plaintiff's wife, "containing so much land uncovered with water, which expression, he says, excludes the notion that the land covered with water, called

Frenchman's bay, was intended to pass by virtue of that deed.

As regards this latter point, the conveyance in question might be of consequence to shew the extent which the plaintiff professed to possess or claim ; and if that deed, put in by him as the one under which he claimed title, manifestly excluded the land covered by the waters of the bay, it would be difficult to construe the plaintiff's possession of land to the north of the bay, into possession of the spit of land south of the bay ; but if the boundary lines in the deed include the bay, the expression "land uncovered with water," can be only taken as the quantity supposed by the parties to be uncovered with water, omitting to mention the quantity covered with water, probably supposed by the vendor and purchaser to be of little value, and forming no part of the beneficial purchase. It is, I believe, not uncommon in letters patent granting lots of land including lakes, to mention the quantity uncovered with water, so that the grantee, entitled to a certain number of acres of land, might not appear to have received more than his allowance, and so that the land covered with water and therefore unfit for agricultural purposes might not count against him, but this does not prevent the land covered with water from passing by the grant, if included within the boundary lines ; the expression seems to convey the idea by implication that besides the arable land, or dry land, there is included in the grant, land covered by water ; and placing this construction upon the conveyance now in question, I think the expression in the deed rather in favor of the plaintiff than against him.

Then, as to the main question: I see no reason to suppose that the condition of the premises is materially different from what it was at the time the patent issued, or that the piece of water called Frenchman's bay was then more properly a bay than it is now. The patent for lot 25 is not put in evidence in this case, to shew where the south-east angle of that lot, which is said in the patent granting No. 24 to be the boundary of the latter lot, but if the description of lot 25 commenced upon the bank of the lake, at the south-west angle

of the lot, or at the south-east angle of lot 26, and that the front or southerly boundary of 25 was upon the lake or bank of the lake, as I suppose it was, this would manifestly place the south-east angle of lot 25 (the point of commencement of the description of 24) outside of the spit of land and south of the pond of water, for not otherwise could the third or returning line of 25 end at a point from whence it could be carried along the shore of lake Ontario to the place of beginning, unless it could be shewn that at the time of the patent, the spit of land now in question had no existence.

If we take the point of commencement in the description of lot 24 to be external to the bay and spit of land, then there is no way of reconciling the remaining description with the locality, than by supposing the closed state of the bay to be that which existed at the time of the patent, and the state of breach and passage of the water, though from the lake as casual and temporary. There is no evidence as to the actual state of the premises in 1796. The probability is that the line of coast was supposed to be continuous, and that no actual survey was made antecedent to the patent. Under these circumstances, I have no difficulty in coming to the conclusion that the patent was effectual in granting the land covered with water included within the side lines of 24 and the spit of land outside, which, in my opinion, is the bank of the lake; and the lake, to which the third line of the description runs, is the water outside of that bank, along which the fourth line runs to the place of beginning.

I have considered a question that might have been raised on behalf of the plaintiff. The law is well settled in England as to the property in the land covered by sea water. It belongs to the Crown. The same rule prevails regarding all creeks and arms of the sea, and all navigable rivers up to the point where the tide rises. A different rule is however held to be in force upon all English rivers above the tide waters. There may be rights of public highway upon navigable rivers above the rise of the tide, but the land covered by the water of the river above tide water, is held to belong to the riparian proprietors. Those having then

boundaries on each side, having property in the bed of the river to the middle or thread of the stream. However inapplicable this rule may be to such rivers as the Saint Lawrence and Ottawa, and more especially to the great lakes, to such waters as lake Simcoe, lake Saint Clair, or even to the Rice lakes, we have no common law to guide us but that of England ; and it would seem to follow that the plaintiff, as riparian proprietor of lot 24, is entitled to all the land covered with water to the provincial boundary line in the middle of lake Ontario, and the consequence would be, that any accretion of land from the waters of the lake, whether in the shape of islands or otherwise, would belong to the riparian proprietor. Indeed, all existing islands at the time of the concession from the crown, would follow the same rule, and the bank or spit of land now in question would belong to the plaintiff or proprietor of lot 24, whether it was cast up before or after the grant, without reference to the description in the patent. I am of opinion however, that if the question comes to be settled without legislative interference in this country, that our great rivers and lakes will not be held to be of the description of waters, such as in England are above the rise and fall of the tide : all the practice of the land granting departments in the country shew a different impression to have prevailed in all our harbors, and even upon the interior lakes, water lots have been granted outside of the land of the riparian proprietors, and islands such as Barnhart's island in the Saint Lawrence, Wolfe's island, the whole of the Thousand Islands, the Allumette and Calumet islands in the Ottawa, islands in the Detroit and Saint Clair straits, and all other similarly situated, have been treated as belonging to the Crown, notwithstanding grants on the shore to riparian proprietors ; so that either the rule of the common law of England has been by common and universal interpretation, most reasonably held not to apply to the lakes and great rivers of Canada, or else the whole of the lands of riparian proprietors, being held under grants from the Crown, containing boundaries defined in writing—these boundaries, when running to the water's edge, the bank of the water, the lake or the river,

must be taken to extend no further, and to leave the land covered with water ungranted and the property of the Crown. It appears to me, therefore, that we must hold the grant now in question to extend to the edge of the lake and no farther ; and though accretions of land may belong to the riparian proprietor to whose land on shore they become adjunct, in like manner as if the estate were upon the sea shore, yet islands formerly existing, as well as new accretions of land not adjoining the shore, must be taken to belong to the Crown, as well as the land covered by the water.

The other defences set up in this case, appear to me, clearly untenable. I can see no pretence for a right of common and public highway along the borders of the lake, or of a right of fishing, or rather of landing fish on what is, I think, improperly called the lake shore. The sea shore, properly so designated, is the space of land between the low and high water of ordinary tides, absolutely exclusive of land which is casually covered with water, by means of storm, or inundation from other causes. The only natural cause, according to the common law, for the creation of a shore is wanting on our waters ; and if we were to imagine a shore consisting of a space of land between low and high water—that is to say between the low water of the lake in its tranquil state and its high water when agitated by the winds, we should, in giving that shore the legal attributes of the sea shore, be making that space a shore which is not so on the tide waters of the sea, held to be produced by the same causes ; for on the sea coast there is just such a space, much more extensive than on these inland waters, which is above the high water tide mark, and which is covered by water when the sea is agitated, and which yet, according to the English authorities, is no part of the sea shore. As the sea rises, no doubt there is a common and public highway over the water, but when it falls to the ordinary level of tide water, there is no highway on the land. Moreover, the actual sea shore may be granted by the Crown, and then there is no highway over it ; and even when it is ungranted, unless by dedication, there is no

highway against the will of the Crown. I think that in grants of land in our waters having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place the highway; and I see no pretence for claiming a right of public highway upon the granted land, unless it be specially reserved.

The case of *Blundell v. Catterall*, 5 B. & A. 268, is very interesting. The difference of opinion between Mr. Justice Best and the other judges, eliciting a most elaborate judgment, in which most of the learning applicable to this case, as regards the rights claimed by the defendant, will be found. *Scrutton v. Brown*, 4 B. & C. 485, 496; *Calmady v. Rowe*, 6 C.B. 877; *The Duke of Beaufort v. Mayor of Swansea*, 3 Ex. 413 are cases which define with great precision the legal rights of the Crown, the grantees of the Crown, and the public, in and to the sea shore; and I see nothing in these cases, or in the numerous authorities to which they refer, to found a pretence for a claim of public highway or right of landing fish upon a shore granted to a subject.

It is to be observed, moreover, that the trespass complained of in the present instance, is shewn to have been committed above the point which by possibility could be deemed shore, and that it consists not merely of the use of a way or of the convenience in landing fish, but in the driving of stakes and making erections, which no right of way or fishery could justify.

The whole case, in my opinion depends upon the construction to be given to the patent granting the lot 24, and upon the question whether the trespass complained of was committed within the boundaries of that lot. According to my reading of the description in the patent, the land on which the trespass was committed is included; and I am of opinion that the verdict given in favour of the plaintiff should not be interfered with, and that the rule nisi for a new trial should be discharged.

McLEAN, J, concurred.

Note.—McLEAN, J., differed from MACAULAY, C. J., as to the question of high and low water mark, he agreeing with SULLIVAN, J., that a distinction of high and low water could only be drawn where tide exists, and not in the inland waters of this province.

DOE SPAFFORD V. BREAKENRIDGE AND J. AND S. McNUTT.

A., the grantee of the crown for lot number 12 in the second concession of Reach, died intestate before the year 1843, leaving defendant B. his heir-at-law. By indenture bearing date the 12th September, 1843, the defendant B., without having made any entry on said lot, for and in consideration that the lessor of the plaintiff had sworn that the intestate (the original locatee of the lot) had bargained and sold to him the said lot, and also for and in consideration of the sum of five shillings, to him in hand paid, the said defendant B. gave, granted, bargained, sold, assigned, released, transferred and conveyed, unto the said lessor of the plaintiff, his heirs and assigns, the said lot, to hold in fee—this indenture was registered the 3rd June, 1850. By indenture made the 21st of January, 1850, between the defendant B. and one Brown, then in possession of the north half of the said lot, it was witnessed that the said Brown, for considerations in the said deed mentioned, had agreed to surrender and assign the said land of which he was so possessed, to the said defendant B., the said last mentioned indenture having been registered the 26th of February, 1850. Also, by two several indentures bearing date the 21st January, 1850, between the said defendant B. and defendants C. & D. respectively, it was witnessed, for considerations in the said several indentures mentioned, that the defendant B. conveyed to the defendants C. & D. respectively, the said south half of the said lot—viz., 50 acres of the said south half to each of the said defendants C. & D.; and said defendants C. & D. severally executed mortgages of the property conveyed to them severally by the said defendant B.—said last mentioned several indentures having been registered the 16th February, 1850. It was admitted or proved that as much as 12 years since, a man named Winchell was in possession of this lot, claiming under one Gideon Bullis; that a deed of bargain and sale of the lot in question existed (but was not produced or proved) as from the patentee to Bullis; that on the 11th of October, 1838, the said Bullis executed a conveyance in fee of the lot to Winchell, which was registered 24th February, 1840; that on the 18th of March, 1841, Winchell executed a conveyance of the said lot to George Brown, which was registered the same day; that Brown continued in possession of the north half ever since, and that the defendants C. & D. entered into possession of the south half of the lot under Brown.

Held, 1st. That the heir-at-law can convey before he enters.

2nd. That the deed of the defendant B. to the lessor of the plaintiff is not to be regarded as voluntary, under the statute 27 Eliz. ch. 4, nor will the deeds subsequently executed between the defendant B. and the defendants C. & D. for a valuable consideration, defeat it on that ground of objection.

Held, 3rd. That the possession of Brown and the defendants C. & D., who erroneously supposed they were holding under the patentee of the Crown, and entered claiming title under him, was not a holding so adverse to the defendant B., the heir-at-law of the patentee of the crown, and the true owner, as to invalidate his deed to the lessor of the plaintiff.

Held, 4th. That even if the deed of the defendant B. to the lessor of the plaintiff was inoperative by reason of an adverse occupancy, that as to the north half for which he defends, he was remitted upon the execution by Brown to him of the indenture of the 21st January, 1850.

Held, 5th. That the defendant B., as to the north half, is not in the position of a person resisting a stranger, but is the bargainer in possession, resisting his own bargainee against his own deed; and that as to the south half, having released to and confirmed the title of the defendants C. & D. to the south half, defendants C. & D. immediately re-conveyed to him in fee by way of mortgage, and held possession only under a leave granted in the mortgages, and being estopped from denying the mortgagee's title, they are also estopped from disputing the title of the lessor of the plaintiff claiming under a deed from the same person as they claim under, prior to the deed to them.

Held, 6th. That registration of a deed from a person having no title, or a fraudulent title, will not give a priority over a deed from a person having a good title.

Ejectment for lot number 12 in 2nd concession of Reach.
Defendant Breakenridge defends for the north half, as land-

lord of George Brown ; Defendants J. & S. McNutt defend for the south half, as tenants in possession.

Declaration is of Easter Term, 14th Vic. Demise, 2nd July, 8th Vic.

It appeared in evidence, that the government patent granting the lot in question to John Breakenridge was sealed the 30th July, 1841, it then being a track of woodland in a state of nature.

That the grantee of the Crown died intestate before the year 1834, leaving John Breakenridge, the defendant, his eldest son and heir-at-law (then a minor), him surviving.

That by indenture bearing date the 12th September, 1843, and made between the said defendant John Breakenridge and the lessor of the plaintiff, the said John Breakenridge, "for and in consideration that the said lessor of plaintiff hath sworn that the said John Breakenridge, deceased, the original locatee of the lot, did *bargain and sell* to him the lands thereafter mentioned, and also for and in consideration of the sum of five shillings to him in hand paid," gave, granted, bargained, sold, assigned, released, transferred, and conveyed unto the said lessor of plaintiff, his heirs and assigns, lot No. 12, in the second concession of the township of Reach, to hold in fee, with covenants that for and notwithstanding any act, matter, or thing, whatsoever, by him done, committed willingly, or willingly suffered, to the contrary, at the time of the delivery thereof, he was lawfully and actually seized of the said lot, as the true and lawful owner in fee simple, and had good right and authority to grant, sell, and transfer the same as aforesaid ; that the same was free and clear from all incumbrances ; that the lessor of the plaintiff, his heirs and assigns, should and might at all times thereafter quietly possess and enjoy the same, and that the said defendant, John Breakenridge, and his heirs, would *warrant and defend the same* to the said lessor of plaintiff, his heirs and assigns, against the lawful claims of all persons whatever, except that all the covenants and agreements therein contained were limited and restrained in their operation, so that the said John Breakenridge did only covenant against his own acts, and against persons

claiming through him, and none others. This deed was registered the 3rd June, 1859.

This was the plaintiff's case.

On the defence it was either admitted or proved that as much as 12 years ago a man named Winchell was in possession of this lot, claiming under one Gideon Bullis; that a deed, or what purported to be a deed of bargain and sale, existed (not produced or proved) as from John Breakenridge the patentee, to Gideon Bullis, of the lot in question.

That on the 11th October, 1838, said Bullis executed a deed of bargain and sale to James Winchell, purporting to convey to him this lot in fee, Registered 24th February, 1840.

That on the 18th March, 1841, said Winchell being then in possession and having made some improvements on the land, executed a deed of bargain and sale to George Brown, the present tenant of defendant Breakenridge, of this lot in fee, which was registered on the same day.

That Brown entered into possession before or about the date of this deed, and has continued to possess the north half ever since, and made large improvements.

There was no evidence that the defendant John Breakenridge had entered on the lot, as heir of his father, at any time before the execution of the deed of the 12th September, 1843, to the lessor of plaintiff, or that the latter had ever entered or been actually possessed since.

The defendants McNutts have entered into possession of the south half under Brown, *when* not in evidence.

A letter of attorney under seal, dated 11th January, 1850, from the defendant John Breakenridge to David B. Read and Alexander Leith, appointing them his attorneys jointly and severally, and empowering them to take possession of the said lot, to contract, to sell, and convey the same or any part, and all such right, &c., as he might have thereto, at prices at their discretion, and to execute deeds of conveyance in fee or for any less estate, as they might deem fit, &c.; also to get in the claim or title of any one pretending to have any claim or interest thereto; to buy up incumbrances, if any; to take release thereof, &c., and generally

to do all things necessary in the premises, &c. Registered 21st February, 1850.

By indenture made the 21st January, 1850, between the defendant John Breakenridge and George Brown, it was witnessed that the said John Breakenridge was entitled to possession of the said lot as heir to his father, and that said Brown was in possession of the north half ; and that said John Breakenridge had commenced an action of ejectment against him ; and that the said Brown had agreed to surrender and assign the said land of which he was so possessed to said Breakenridge, in consideration of being allowed to remain in possession thereof till the 15th September (then next), undisturbed by the said John Breakenridge ; wherefore, and in consideration of the premises and five shillings, said Brown bargained, sold, assigned, surrendered and yielded up to said John Breakenridge and his heirs and assigns for ever, the said land and his interest therein.

And said John Breakenridge covenanted with the said Brown, that he should remain in possession thereof undisturbed by him till the 15th September then next ; provided no waste was committed, and the said Brown quietly yield up the said land to him, and that in the meantime he was tenant to the said John Breakenridge. Executed under seal and signed by Brown by his mark, and by said John Breakenridge by his attorney Leith, and registered the 26th February, 1850.

It was admitted by Brown, who was examined as a witness, that the lessor of plaintiff had brought an action of ejectment against him nearly six years ago, and which was not proceeded with ; Brown also stated that he had sold half the lot to the McNutts, and took their notes for 200*l.*, but had received nothing thereon as yet.

By two several indentures bearing date the 21st January, 1850, between the said defendant John Breakenridge of the first part, and the defendants Jeremiah and Samuel McNutt respectively, the party of the first part, in consideration of five shillings paid by each respectively, and the agreement of each respectively, to pay him the further sum of 187*l.* 10*s.*

in manner as named in certain other indentures by way of mortgage made between the same parties and bearing even date, the said John Breakenridge did give, grant, bargain, sell, transfer, release, convey, and confirm, unto the said parties of the second part respectively, and their heirs, &c., as follows—that is, to Jeremiah McNutt the northerly half of the south half, and to Samuel McNutt the southerly half of the south half of the said lot, each being 50 acres more or less, then being in their possession respectively, not described by metes or bounds, to hold in fee, with absolute covenants for title, right to convey, quiet enjoyment and further assurance. Executed by defendant John Breakenridge by his attorney Leith, and by defendants McNutts in person: receipts printed in the margin not filled up or signed. Both registered the 16th February, 1850, at 10, A.M.

By two several indentures of mortgage, also dated the 21st January, 1850, between the said defendants McNutts respectively, and the said John Breakenridge—the McNutts (respectively) in consideration of 187*l.* 10*s.*, granted, bargained, sold, released and conveyed to the latter, his heirs and assigns, the aforesaid quarters of the said lot, as above conveyed to them respectively; and as being then in their possession respectively; with a proviso in each, for the redemption thereof, and to cease and be void upon payment by each of the sum of 187*l.* 10*s.* with interest to the said mortgagee, by yearly instalments of 12*l.* 10*s.* each, and interest on the whole arrears on the 1st of January in each year—the first to be paid on the 1st of January, 1851, with express covenants for the payment thereof, for title, quiet enjoyment after default, and leave to enter after six months, notice, &c., with power to sell, but right to possess and enjoy in the meantime reserved to the mortgagors. Receipts at the foot not signed. Registered 16th February, 1850, at half-past 11, A.M.

The defendant's counsel, on the whole evidence, submitted that they were entitled to a verdict on the grounds:

1st. That the deed to the plaintiff was not registered till the 3rd June, 1850, a period subsequent to the registry of the deeds from defendant John Breakenridge to the McNutts for the south half.

2nd. That the deed from defendant Breakenridge to lessor of plaintiff was a voluntary conveyance, and void under the statute of 27 Eliz. ch. 4, against purchasers for value, as the McNutts were.

3rd. That it is void or inoperative, the defendant Breakenridge not having made entry as heir of his father (who died before 1834) previous to the execution of such deed, and because of the previous entry and abatement or disseizin of Winchell and Brown, the last of whom was in adverse possession—claiming title under the former and Bullis at that time.

4th. That any presumed deed from the original grantee to the lessor of the plaintiff, would be void for want of registration.

5th. That the deed from defendant Breakenridge to the lessor of plaintiff, wants consideration to render it operative.

The cause was tried before Macaulay, C. J., C. P., at the last Spring Assizes, 1851, held in and for the county of York, when he told the jury that the defendant Breakenridge was estopped as to the north half, and the defendants McNutts as to the south half, as claiming and holding under him, by deeds subsequent to that made by him to the lessor of the plaintiff, which deed was not impeached : that the effect of the several deeds on the defence was to shew that all the persons in possession are virtually tenants under the defendant Breakenridge, and he being estopped they are concluded also.

The jury found for the plaintiff.

In last Easter Term *Read* obtained a rule calling on the lessor of the plaintiff to shew cause why the verdict should not be set aside.

Wilson, Q. C., for plaintiff, shewed cause during the same term.

The objections relied upon by the defendants at the argument, were :

1st. That the heir had not entered before conveying.

2nd. That the McNutts claim under deeds from defendant Breakenridge, registered before his deed to the lessor of the plaintiff.

3rd. That the deed to the lessor of plaintiff was *voluntary*, and not available against subsequent purchasers for value.

4th. That defendant Breakenridge is not estopped or remitted.

Wilson contended that both lessor of plaintiff and defendant Breakenridge, being ignorant of the possession wrongfully taken by strangers and held by Brown at the time the defendant Breakenridge conveyed to the plaintiff's lessor, the Statute of Limitations was not running, the case being within the proviso to the statute 4 Wm. IV. ch. 1, sec. 17, and that shewed such possession not adverse as respected the right of the heir to convey.

That Brown attorned to defendant Breakenridge, and the McNutts (apparently) entered and held under him, wherefore the possession of defendant thus acquired, since his deed to the lessor of plaintiff, accrued to his benefit and was equivalent to prior entry—at all events that he was estopped by his deed—4 Wm. IV. ch. 1, secs. 10 & 11.

That the deed was not voluntary within the act ; and, if it was, that neither he nor the McNutts can set up the defence, the latter, because they are only purchasers for value nominally, and have never paid anything in fact ; and if the defendant Breakenridge's title is bad, his covenants for title, &c., will protect them from ever being liable on theirs.

That he cannot set up the abatement, or disseizin, or rely upon the Statute of Limitations or adverse possession, against his own deed.

Read, for defendants, contended that the deed to the lessor of the plaintiff was without consideration, except five shillings, a nominal one—the recital of the lessor of plaintiff having made oath, &c., being no consideration, though it may have operated as an inducement ; and that the McNutts are purchasers for value, and *bona fide*, and bound by covenants to pay the price.

That the possession was adverse in fact, and the proviso in sec. 17 is inapplicable ; that the deed was inoperative under the rules of the common law and the statutes, and law of maintenance.—Stat. 32 Hen VIII. ; Watkins, 247–8, 529 ; 3 Blk's. Com. 167 ; Adam's Eject. 41, 43 (4) ; Co. Lit. 256.

That what the law prohibits is void ; and that when void, the law being paramount, the grantor may defeat his own deed—as for usury, &c.—Doe dem Evans v. Williams, 9 Ju. 712 ; Doe d. Chandler v. Ford, 3 A. & E. 649 ; Williams v. Protheroe, 5 Bing. 309, 10 Ju. 649 ; Findon v. Parker, 11 M. & W. 675, 11 A. & E. 1020, 1 H. B. 327.

That the doctrine of *remitter* does not apply where a party entering had been reduced to a mere right.

That the registration of deeds of the lot, though they are deeds of disseizin or those holding under them, brought the Register Act into operation sufficiently to protect the subsequent purchasers under defendant Breakenridge, who could have had no notice of plaintiff's claim.

There seems no room to doubt the facts :

1st. That the heir of the patentee did not enter as such, before executing the deed to the lessor of plaintiff.

2nd. And that Brown, holding under a deed from Winchell, and which had been registered, was in possession, claiming to own the lot, when such deed, by defendant Breakenridge to the lessor of plaintiff, was executed.

3rd. But that neither the defendant Breakenridge nor the lessor of plaintiff were aware of such possession, or that the lot was not a tract of unoccupied and uncultivated, or unimproved wood land.

4th. That the possession was not vacant, or to any part where Brown attorned to the defendant Breakenridge, for the north-half, the McNutts being then in possession, under him, of the north half, and therefore in actual possession at and before the time when they took the deeds of conveyance from and gave mortgages to the defendant Breakenridge.

MACAULAY, C. J.—It appears to me—1st. That it is not clearly admitted in the deed from the defendant Breaken-

Mr. Reid referred to numerous cases and authorities, some of which are above mentioned, and to which may be added :—8 T. R. 89 ; 4 M. & W. 361 ; 2 S. & L. 65 ; 2 Evans' Stats. ; 10 Bing. 107 ; 5 Bing. 80 ; 3 B. & Ad. 221 ; 8 East. 552 ; Plow. 88, 111 ; Smith on Contracts, 121 ; Co. Lit. 369. s. 693, p. 363 b. 348 b., 349 b., 347 b., & sec. 659 ; 5 Ba. Ab. 255 ; 4 B. & Adol. 305 ; Com. Dig. Remitter ; 15 M. & W. 786 ; 10 M. & W. 634 ; 3 Rep. 83 B. ; Ambler, 76 ; 2 Taunt. 69 ; 16 East, 212 ; 1 Chitty's Ca. 79 ; 3 Mad. 283 ; 3 Mar. Cow. 278 ; 3 Blk. Rep. 1019 ; Co. Lit. 295 b. ; 2 Scott, 732 ; 2 D. & R. 38 ; 13 Jdr. 539. As to the Memorials, see 2 Esp. 549 ; 2 C. & P. 289 ; 7 W. & W. 102.

ridge to the lessor of the plaintiff, that his ancestor, in his lifetime had conveyed to the said lessor of plaintiff. It merely states that the said lessor *had sworn* that the defendant's father, the original locatee of the lot, did bargain and sell to him the lands in question, in consideration whereof and five shillings, the defendant bargained, sold and conveyed, &c. It however impliedly so admits, for it obviously forms the foundation and inducement, as it constitutes the main consideration for the deed of the 12th September, 1843.

It is not, however, specific enough to establish the fact by conclusion or estoppel against the defendants.

If it did, or even if it is sufficient as evidence, to establish the fact as against them, it would follow that the lessor of the plaintiff's title, would be by a direct conveyance from the grantee of the crown, which, as the law now stands, would impart the estate to him without registration, either to supply enrolments or to comply with the registry acts; and such conveyance having preceded the entry of any of those persons under whom Brown or the McNutts formerly held, and neither the grantee or lessor of the plaintiff having taken actual possession thereof, nor had knowledge of the possession of such other persons, the Statute of Limitation, 4 Wm. IV. ch. 1, would not operate to bar this action, even had twenty years expired since their wrongful entry.

But it is not twenty years since such entry, and though wrongful in fact, it was not intentionally so; for, so far as appears, the person who entered first (Winchell) and all succeeding him, supposed they entered and held rightfully by a deed *inter vivos* from the grantee of the crown to Gideon Bullis.

2nd. If the defendant's father did not actually convey the land to the lessor of plaintiff, the estate descended to his heir-at-law; and it seems admitted in the books, that as heir-at-law (when there has been no disseizin of the ancestor, or abatement of the seizin in law of such heir,) he may convey before he enters.

It is said in Preston on Abstracts, vol. 2, 440, that on the death of each ancestor his heir becomes owner, and by the descent he has a seizin in law; this seizin does not make

him a stock or ancestor, unless he obtains an actual seizin ; and if the lands are held for an estate in possession, he cannot obtain an actual seizin, unless he or some one by his commandment or subsequent assent, or some person to whom he leaves the lands, actually enters into them, or he changes the state of the title by making a conveyance or lease, &c, and thus acquires a new reversion—referring to Co. Lit. 15 a.; Watkins on descents, 64, 3 Wil. 516 ; Doe v. Keene, 7 T. R. 386.

2 Preston, 442.—An actual seizin may be gained of a reversion or remainder expectant on estate for life or in tail, by making a conveyance to uses ; so that the fee is taken back by express limitation or resulting use, under his own act of conveyance.

Watkins on Descent, 38-26.—On the death of the ancestor, the law casts the estate upon the heir ; and as he has thus the right, it gives him also a presumed possession or seizin.

On the death of the ancestor, as the possession would be otherwise vacant, the law supposes or presumes it to be in the heir, and this is called a possession or seizin in law.

Watkins, 47-31, treats of abatement. Watkins 65 : Not if a stranger enter into the lands of an infant and take the profits, he shall be considered as entering as guardian. Ib. 66-49 : The heir may make leases for years, or at will before entry, and so acquire an actual seizin by them—the possession in law of the heir being sufficient if unrebutted by abatement. Ib. 55 : Lands descended are assets before entry. 2. Preston Ab. 296 : While the heir has only a seizin in law, and before that seizin is disturbed by abatement, the heir has a complete ownership for all the purposes of dominion and conveyance by deed or will—referring to Doe Parker v. Thomas, 3 M. & G. 815 ; Crabb, s. 2375 ; Sheppard, 269 ; Plow. 142 ; 2 Mod. 7 ; Doe dem. Brune v. Martyn, 8 B. & C. 514 ; S. C. 2 M. & R. 485 ; 5 U. C. Q. B. R. 135 ; 7 A. & E. 195, 213.

3rd. But I cannot say I think entry in any case necessary, since the provincial statute 4 Wm. IV. ch. 1, sec. 10, which enacts that after the passing of that act (6th March, 1834,)

proof of entry by the heir after the death of the ancestor shall in no case be necessary, in order to prove title in such heir or in any person claiming by or through him, notwithstanding the following section (11), that the act shall not extend to any descent which shall take place on the death of any person who shall die before the 1st of July, 1834; which last I consider is intended to relate to the previous clauses altering the law of descent, and not to section 10, respecting entry &c., of the heir after inheriting—otherwise they are inconsistent, section 10 dispensing with proof of entry after the passing of this act (6th March), and sec. 11 providing its exclusion to any descent before the 1st July, 1834.

Section 10 is also to be taken in connexion with sections 22, 23, 37, 42, and 59—words “*persons last entitled.*”

This view is also strengthened by sec. 47 (9 Vic. ch. 34, sec. 14, which last is repealed by 13 and 14 Vic. chap. 63, sec. 6,) and sections 16, 32, 42, 43, &c.

The act distinguishes throughout, the different periods from whence certain portions are to operate. See the language of the provincial statute 13 and 14 Vic. chapter 66, sec. 1, at the words “*for the present year,*” and sec. 2; also, chapter 67, sec. 10, of the same statute, the words “*present year.*”

The statute 4 Wm. IV. ch. 1, is founded on the imperial statute 3 and 4 Wm. IV. ch. 27 and 106, neither of which contain a clause similar to sec. 10, but which do contain the others.

See of the last act sec. 11, similar to sec. 11 of our provincial act: “*descent*” is defined to mean the title to inherit lands by reason of consanguinity, &c., and “the person last entitled to land” the last person who had a right thereto, whether he did or did not obtain the possession, or the receipt of the rents and profits thereof; and it is enacted that no person shall be deemed to have been in possession of any land merely by reason of having made entry thereon; so that if in England, an heir must still enter what would formerly have sufficed to give him seizin in fact, or in deed—namely, a bare entry with intent to take seizin, will no longer do.

But it seems to be understood that he may never transmit by descent without entry; and I apprehend he could previously have leased or conveyed, or devised while living, without actual entry, where his seizin in law remained unobstructed and undisturbed.—Shelford on the Real Property Acts, page 344.

4th. I do not think the defendant's deed to Spafford can be regarded as voluntary, within the meaning of the statute 27 Eliz. ch. 4. This is shewn by *Hill v. Bishop of Exeter*, 2 Taunt. 69; *Cow.* 705; 1 *Esp.* 178; 3 *Sta. N. P. C.* 160.

5th. And that the deeds subsequently executed between the defendants Breakenridge and Brown and the McNutts, will not defeat it. On this ground of objection, see *Doe dem. Parry v. Jarvis*, 16 *East.* 212; *Cow.* 705.

6th. Although the persons entering and holding under Bullis supposed they entered and held under the patentee of the Crown (erroneously so supposing), yet having entered, claiming title, even if entitled to be looked upon as having so entered adversely to the defendant Breakenridge, who as heir of such patentee was the true owner, still, I do not think the possession, so wrongfully held, invalidates his deed to the lessor of the plaintiff.

1st. Because neither party to that deed knew of or suspected it; and 2nd. Because it is within the proviso to sec. 17 of the Statute of Limitations, which statute was not, (under the circumstances) running against him at the time. *Plow.* 233; *Williams v. Thomas*, 12 *East.* 141, 155; *Doe dem. Brune v. Martyn*, 8 *B. & C.* 514-21, *S. C.* 2 *M. & R.* 485; *Doe dem. Roberts v. Roberts*, 2 *B. & A.* 367; 2 *J. & W.* 894, 574-78; *Sloane v. Packman*, 11 *M. & W.* 770; 6 *Q. B.* 166, 20 *L. J. N. S. C. P.* 11; *Doe dem. Milbourn v. Edgar*, 2 *Scott*, 732.

7th. Even if the defendant Breakenridge's deed to plaintiff's lessor was inoperative by reason of an adverse occupancy, I think that as to the north half, for which he defends, he was remitted upon the execution by Brown of the indenture of the 21st January, 1850, between him and the said defendant.—3 *Stephens's Com.* 279; *Doe dem. Daniell v. Woodroffe*, 10 *M. & W.* 608-34; *Woodroffe v. Doe dem. Daniell*, 15 *M. & W.* 769-86; *Brown's Legal Maxims*, 103.

8th. As to the other half it may be otherwise—the defendant having released to the McNutts and confirmed their title, previously to the execution of their mortgage to him. Co. Lit. S. 475-77 ; Cro. El. 534.

9th. But nevertheless, I consider the defendants estopped as respects both halves.

If any interest passed to the lessor of plaintiff by defendant's deed of the 12th September, 1843, he is entitled to recover accordingly, for it must have been a sufficient interest to entitle him to recover in ejectment ; if not, the defendant, as to the north half, was estopped, and being remitted, the estate thus vested in him would accrue to the lessor of plaintiff's benefit.—2 Smith's Leading Cases, 417, 456 ; 2 Saund. 418 and notes ; 10 B. & C. 202 ; 5 M. & R. 202 ; Webb v. Austin, 7 M. & G. 701.

If defendant is estopped, it would seem to preclude further enquiry, and to shut out the various questions that have been raised touching non-entry, abatement, the Statute of Maintenance, &c.

The defendant Breakenridge is not in the position of a person resisting a stranger ; but is, as to the north half, the bargainor in possession, resisting his own bargainee, against his own deed.—Goodtitle v. Bailey, Cow, 597 ; Fairtitle v. Gilbert, 2 T. R. 171 ; Philpott v. Philpott, 20 L. J. N. S. C. P. 11.

As to the south half : having released to and confirmed the title of the McNutts, they executed mortgages to him in fee, and consequently—unless they inure to the lessor of plaintiff's benefit—hold under the defendant Breakenridge ; and I do not see that they can now be looked upon otherwise than as mere tenants of his, under the leave to occupy contained in the mortgages, and so virtually holding under leases made by him since he conveyed to the lessor of plaintiff ; and if estopped from disputing their mortgagee's title, so also estopped from disputing the lessor of plaintiff's, claiming as he does, under a deed from such mortgagee prior to the deeds from him, under which they (the McNutts) claim.

It is not merely a case of two opposite parties, both claim-

ing under defendant Breakenridge and the lessor of plaintiff's deed the oldest, but of two parties claiming under such defendant—the one under a deed in fee in 1843, and the other under a demise in 1850, and the lessor of plaintiff being remitted by all the defendants, under contrivances adopted on purpose to overreach the deed which had been so made by the defendant Breakenridge to him.

Therefore on the ground of remitter or estoppel, or both, I think the rule should be discharged.—Cro. El. 534.

10th. As to the priority of registration, notwithstanding the case of Doe dem. Brennan v. O'Neil, 4 U. C. Q. B. R. 82, I do not think the registering a memorial of a forged deed, or a deed from a person falsely personating the owner, or having no valid or legal title, such a registration as can give efficacy to the deed, the registration of which preceded the registration of the defendant's deed to the lessor of plaintiff, in preference to the defendant Breakenridge's subsequent deed, &c., to the McNutts.

It cannot be fraudulent and void as to deeds not from the same party, but from strangers who had no title ; and even admitting them to have acquired a seizin in fee tortiously, as by abatement or disseizin, still the chains of title are quite distinct, and the deed held under the heir of the grantee of the Crown did not require registration.

The Registry Act never could have intended to set off forged deeds or conveyance by persons having no title, in preference to rightful conveyances of the true owners.

On the whole I think the rule should be discharged.

McLEAN, J.—In this case the deed from defendant Breakenridge to lessor of plaintiff, made on the 12th September, 1843, is not impeached on the ground of fraud, and there is no reason assigned, why the grantor in that deed should endeavour to avoid his own deed. It is scarcely probable that such an attempt would be made, unless the grantor imagined that there had been something unfair or improper on the part of the lessor of plaintiff, in obtaining the execution of that deed from him. The deed, on the face of it, appears to have been executed in consideration of, and in confirmation of a bargain and sale of the

premises made by John Breakenridge, the patentee and the ancestor of the grantor. There is an additional consideration of a nominal sum of five shillings, and the deed contains covenants for quiet enjoyment by the grantee, and for further assurances by the grantor. The covenants are so far limited and restrained in their operations, by a clause in the latter part of the deed, that the grantor only covenants against his own acts and against persons claiming through him and none other. This deed, as between the lessor of plaintiff and Breakenridge, has sufficient and ample consideration to support it. Can the defendant Breakenridge then defeat his own deed, by shewing that at the time of his conveyance others were in possession of the lands, claiming under his father, or claiming under a supposed title, since admitted to be invalid by the recognition of the title in himself? It appears to me that his title to the whole lot having been admitted by all the parties on the lands, and the north half of the lot being in his actual possession through his tenant, he cannot now deny the force and effect of his deed, and that the lessor of plaintiff is entitled to recover, at all events, for the north half of the lot against Breakenridge. Then as to the south half, the two other defendants set up a title recently derived from Breakenridge, who had years previously transferred his estate to the lessor of plaintiff. They cannot be in a better position than the party under whom they hold, and the lessor of plaintiff is entitled to recover against them also. All question as to possession under any former supposed title, seems to have been put an end to by the recognition of the right of the defendant Breakenridge as heir-at-law of his father, and the moment that right was acknowledged, it inured to the benefit of the lessor of plaintiff, and removed any doubt which might have otherwise arisen.

It does not appear to me that the defendant can be said to have entered into the north half, by virtue of the assignment or agreement made by Brown after an action of ejectment had been commenced against him. That instrument does not profess to do anything more than to give up possession to Breakenridge, in consideration of being allowed

to remain on the premises for a certain period. It admits the title previously existing in Breakenridge, and on which he brought his action of ejectment, and it does not in any way affect that title. It would, as appears to me, have been a good defence in that action to have shewn the deed previously made to the lessor of plaintiff by Breakenridge; and the defendant could not be heard to allege in his own favor that he had committed an illegal act by conveying when another was in adverse possession, more especially when such adverse possession was not set up by the party who held it. There is in fact nothing to shew that any person ever held possession of the lot in question adversely to Breakenridge the ancestor, or adversely to the heir-at-law since his death. Under these circumstances, I am of opinion that the ruling of the learned Chief Justice of this court, who tried the cause, was correct, and that the rule nisi for a new trial must be discharged.

SULLIVAN, J., concurred.

Rule nisi discharged.

A DIGEST

OF

THE CASES REPORTED IN THIS VOLUME.

ACCOUNT STATED.

Admission.] 1. One of two defendants having admitted to a witness called by the plaintiff, that there was a balance of 20*l.* 15*s.* due to the plaintiff, from which was to be deducted an unascertained debt due to the other defendant, and also a balance on a certain sum due by the plaintiff to his brother, which he had agreed should be paid by the defendants out of the moneys coming to the plaintiff: *Held*, not sufficient evidence to support a count upon an account stated.

Bloomley v. Grinton et al., 309.

2. An assignment to a right of real estate executed under seal by the defendant only, in which the consideration money is acknowledged to have been paid, will not support an action for the purchase money, nor be received as proof of an original executory agreement in writing for the sale of the premises; nor will subsequent admissions of defendant's liability supply the place of written proof or of an account stated, unless some specific amount be acknowledged.

Green v. Burtch, 313.

3. An admission made casually to a stranger, and not to the plaintiff or an agent of his, is not in itself an accounting or statement sufficient to sustain an action on the account stated.—*Id.*

AGREEMENT.

Sale of land.] See "Admission," 2.

Executory agreement.] 1. A. enters into an agreement in writing, signed by him only, as follows:—In consideration of 70*l.* paid in hand by B., I hereby agree to sign a lease of lot No. 32 in the second concession of Etobicoke, directly the same is drawn up by the solicitor, in the following terms, viz.: To let B. have the farm for seven years, commencing from the first of April, 1848, at 70*l.* per annum; the first payment having been this day paid by the said B. (the receipt being acknowledged), and the next payment on the first of April, 1850, and so on. If B. wants to give up the farm before the expiration of four years, he is to pay 140*l.* to me; if after four years, then 70*l.* If I want to sell the farm, then I am to pay B. on the same terms. Six months' notice to be given to either party. I am to put up a frame barn, to be completed &c.—also a house, &c.; also to split 4,000 rails, and have them ready for hauling by the first of January, 1848, and to secure whatever wheat B. puts in this fall by fence. B. is to have his firewood, &c.; and if he puts in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off. *Held, per Cur.*, that such an agreement is not a

lease creating a term of years, but is only an executory agreement. *Held also*, that in this case, debt for use and occupation, and not debt on the demise, is the proper form of action.

McLean v. Young, 62.

Construction of.] 2. The ancestor of the defendant made an agreement under seal with the plaintiff, as follows:—"Now the condition of this agreement is such—the said John Phelan [the defendant's ancestor] doth hereby for himself, his heirs, executors, administrators and assigns, give up unto the said James Phelan [plaintiff] all his right, title and interest in and to lot 45 in the first concession of North Easthope, and to give him a clear deed of *the same*, and also one waggon, one fanning mill," &c. The plaintiff on his part did, for himself, his heirs, &c., in consideration of the above deed and articles mentioned, promise and agree to pay unto the said John Phelan (defendant's ancestor), his heirs or assigns, the sum of 250*l.*, by instalments, and also to allow the said John Phelan the use of the dwelling-house in which he then resided, and four acres of land during his lifetime. *Held, per Cur.* (Sullivan, J., *dissentiente*), that the words "the same" in the agreement, referred to lot 45 as their antecedent, and not to the right, title, and interest, of the defendant's ancestor therein. By *Sullivan, J.*—that the words referred to the right, title and interest of the ancestor in the land, and not to the land itself.

Phelan v. Phelan, 275.

ASSUMPSIT.

Money lent—Money had and received.] 1. Assumpsit for money lent, and money had and received.

On the 6th September, 1842, the wife of the plaintiff, with his assent, in consideration of 70*l.* paid, (the money being the proceeds of the sale of her own lands), obtained from the defendant a lease of certain premises, to hold to her own use during her natural life, the defendant covenanting, at the expiration of the lease, to pay *Hannah Healey, heirs or assigns*, the sum of 50*l.* *Held, per Cur.*, that the plaintiff's remedy, if entitled to sue for the 50*l.*, must be under the lease in an action of covenant; and that, having assented to the demise to his wife, he cannot now sue for the consideration money paid to the defendant for the lease, either as money lent, or as money had and received to his use.

Healey v. Bongard, 212.

Balance of account.] 2. In this action the plaintiff sued for 70*l.* balance of account, and proved himself entitled to 49*l.* 19*s.* 5*d.* : *Held*, that defendant could not prove payments made on the whole account, and apply the same in reduction of the balance sued for.

Stovel v. Allen, 300.

3. At the trial a witness was called, who stated that as agent for the plaintiff he had given defendant certain parcels to deliver, with a memorandum of charges on each parcel, and that defendant had collected many of them, and had made payments on account, leaving a balance due plaintiff, for which this action was brought; that witness had had a memorandum book, in which he had entered all the parcels given to the defendant, with the charges against them, and had also credited defendant with the amounts paid; that he had given the memorandum book to the plaintiff, and had since searched among papers left by him

with plaintiff's agent for it, but without success. The witness produced a statement made from the memorandum book, and said he recollected the delivery of the parcels, his recollection not depending on the memorandum book, but that he could not speak of the sums except from the memorandum book : *Held*, that the non-production of the memorandum book was not sufficiently accounted for, to allow of the secondary evidence given of its contents.—*Id.*

DEMURRER.

1. Sufficiency of declaration for calls under the statute 1 Wm. IV. ch. 12.

The Marmora Foundry Company
v. Murney, 1.

Setting down demurrer for argument.] 2. Plea to declaration for malicious arrest, that defendant had reasonable and probable cause for arresting the plaintiff, and did so without malice, for that the defendant had recovered a judgment, &c. against the plaintiff, and that while the judgment remained unsatisfied, the plaintiff continued in possession, &c., of certain household furniture, &c.; and that the plaintiff made an assignment to A. B. of said household furniture, and that by means of the said assignment the plaintiff had prevented the said furniture, &c., being taken in execution, and was enabled to hold the same, against the claim of the defendant, and so the defendant saith that the plaintiff, being in possession, &c., and having made such assignment &c., and preventing the same being taken in execution, &c., the defendant had reasonable and probable cause for arresting him as in the declaration alleged : *Held* bad, on special demurrer, for uncertainty,

and as amounting to the general issue : *Held also*, that either party may set down a demurrer for argument, and causes of general demurrer should be delivered to the judges in the form of notes by the opposite party to the one setting down the demurrer for argument.

Jones v. Dunn, 204.

Trover.] 3. 1st count : Trover for two horses and two mares. 3rd count states, that before and at the time when, &c., plaintiff was possessed of horses and mares of like number, which were let to hire to one A. for a term unexpired, and that defendant wrongfully intending to injure plaintiff, seized and took the same and converted and disposed thereof to his own use, &c. 4th plea to 1st count : The issue of a warrant against the goods of A. at the suit of B., directed to defendant as constable, commanding him to attach, seize, &c., the goods and chattels of A., and that said goods and chattels in the first count mentioned were the goods and chattels of A., and that plaintiff claimed title thereto, under color of a conveyance thereof made by A. to him, for a pretended consideration, to the intent, &c., and that defendant as such constable did seize and take the said goods and chattels, which is the supposed conversion. 5th plea to 2nd count : That defendant as such constable, under and by virtue of said warrant, did seize and take, &c., the said goods and chattels of A., as by the said warrant he was commanded to do, being the said supposed conversion in the second count mentioned : *Held*, that the 4th plea was bad, as amounting to an argumentative denial that plaintiff was possessed as of his own property ; and that the 5th plea was also bad, as amounting to the

general issue, and also on the ground that it does not confess, avoid or justify, any injury to the plaintiff's reversion.

Switzer v. Ballinger, 338.

DETINUE.

Mortgage.] 1. The plaintiffs having obtained letters of administration, brought an action of detinue to obtain possession of an indenture of mortgage in fee, made to the intestate, and after his death in the possession of the defendant; *Held per Cur.*, that the title to the mortgage follows the legal estate, and that it therefore belongs to the mortgagee's heir.

Riorden et al. v. Brown, 199.

2. *Seemle*, that a lien may be specially pleaded in an action of detinue.—*Id.*

EJECTMENT.

Amendment of demise.] 1. Where an action of ejectment is brought by the heir-at-law against his ancestor's widow, and the demise is improperly laid before the forty days of quarantine have expired: *Held*, that the demise may be amended by the judge at Nisi Prius, and that evidence of the ancestor's possession was rightly received.

Doe Callaghan v. Callaghan, 348.

Quarantine.] 2. Quarantine extends only to the mansion or dwelling-house in which the widow is entitled to reside concurrently with the heir.—*Id.*

Possession.] 3. In an action of ejectment for land, the estate of which is in the crown, where neither party shews any title beyond a short possession: *Held*, that the tenant in possession, if he entered peaceably and under color of a claiming right, may set up the

ius tertii as a defence to such action.

Doe Wilkes v. Babcock, 388.

Conveyance from heir-at-law—Registration.] 4. A., the grantee of the crown for lot number 12 in the second concession of Reach, died intestate before the year 1843, leaving defendant B. his heir-at-law. By indenture bearing date the 12th September, 1843, the defendant B., without having made any entry on said lot, for and in consideration that the lessor of the plaintiff had sworn that the intestate (the original locatee of the lot) had bargained and sold to him the said lot, and also for and in consideration of the sum of five shillings to him in hand paid, the said defendant B. gave, granted, bargained, sold, assigned, released, transferred and conveyed, unto the said lessor of the plaintiff, his heirs and assigns, the said lot, to hold in fee: this indenture was registered the 3rd of June, 1850. By indenture made the 21st of January, 1850, between the defendant B. and one Brown, then in possession of the north half of the said lot, it was witnessed that the said Brown, for considerations in the said deed mentioned, had agreed to surrender and assign the said land of which he was so possessed, to the said defendant B.: the said last mentioned indenture having been registered the 26th of February, 1850. Also, by two several indentures bearing date the 21st of January, 1850, between the said defendant B. and defendants C. & D. respectively, it was witness for considerations in the said several indentures mentioned, that the defendant B. conveyed to the defendants C. & D. respectively the said south half of the said lot—viz., 50 acres of the said south

half to each of the said defendants C. & D. ; and said defendants C. & D. severally executed mortgages of the property conveyed to them severally by the said defendant B. —said last mentioned several indentures having been registered the 16th February, 1850. It was admitted or proved that as much as twelve years since, a man named Winchell was in possession of this lot, claiming under one Gideon Bullis ; that a deed of bargain and sale of the lot in question existed (but was not produced or proved) as from the patentee to Bullis ; that on the 11th of October, 1838, the said Bullis executed a conveyance in fee of the lot to Winchell, which was registered the 24th of February, 1840 ; that on the 18th of March, 1841, Winchell executed a conveyance of the said lot to George Brown, which was registered the same day ; that Brown continued in possession of the north half ever since, and that the defendants C. & D. entered into possession of the south half of the lot under Brown.

Held, 1st—That the heir-at-law can convey before he enters.

Held, 2nd—That the deed of the defendant B. to the lessor of the plaintiff is not to be regarded as voluntary, under the statute 27 Eliz. ch. 4, nor will the deeds subsequently executed between the defendant B. and the defendants C. & D., for a valuable consideration, defeat it on that ground of objection.

Held, 3rd—That the possession of Brown and the defendants C. & D., who erroneously supposed they were holding under the patentee of the crown, and entered claiming title under him, was not a holding so adverse to the defendant B., the heir-at-law of the

patentee of the Crown, and the true owner, as to invalidate his deed to the lessor of the plaintiff.

Held, 4th—That even if the deed of the defendant B. to the lessor of the plaintiff was inoperative by reason of an adverse occupancy, that as to the north half for which he defends, he was remitted upon the execution by Brown to him of the indenture of the 21st January, 1850.

Held, 5th—That the defendant B. as to the north half is not in the position of a person resisting a stranger, but is the bargainer in possession resisting his own bargainee against his own deed ; and that as to the south half, having released to and confirmed the title of the defendants C. & D. to the south half, defendants C. & D. immediately re-conveyed to him in fee by way of mortgage, and held possession only under a leave granted in the mortgages, and being estopped from denying the mortgagee's title, they are also estopped from disputing the title of the lessor of the plaintiff claiming under a deed from the same person as they claim under, prior to the deed to them.

Held, 6th—That registration of a deed from a person having no title, or a fraudulent title, will not give a priority over a deed from a person having a good title.

Doe Spafford v. Breakenridge.
et al., 492.

EVIDENCE.

Admissibility of.] A declaration made under the statute 5 George II. ch. 7, by a party residing in parts beyond the sea, and who could not be received to state on oath at the trial the facts therein contained, is inadmissible in evidence.

Gabriel v. Derbyshire, 422.

Copartners.] One of two copartners, sued alone for a copartnership debt, is admissible as a witness for the copartner sued, on endorsing his name on the record, under the provincial statute 7 Wm. IV. ch. 3, and by force of the statute 12 Vic. ch. 70.

White v. Wycott, 320.

Trespass—Evidence under general issue.] That the defendants' proceeding to straighten a highway, acting as trustees of the said highway, under a by-law of the Municipal Council, passed in 1848, and under proceedings in General Quarter Sessions in 1823, and in so doing encroached on the plaintiff's possession, are not entitled to the protection of the statute 59 George III. ch. 1. Nor can they give the special matter in evidence under the general issue.

Joy v. McKinn et al., 13.

GAOLER.

The gaoler of a common gaol is bound to receive into and detain in the gaol, until released by lawful authority, a prisoner delivered into his custody by a constable on a charge of felony, without warrant; and may justify in an action for false imprisonment, without showing what the particular felony was, with which the plaintiff was charged.

McKellar v. McFarland et al., 457.

INTERPLEADER.

Effect of order.] In an action of trespass against the plaintiff in a writ of *fi. fa.* for taking, &c. the goods of the present plaintiff, the defendant pleaded that he had committed the trespasses in aid of the sheriff's officer acting under the writ, and at his request, in the execution of the same, and then showed an interpleader order of

the judge of the county court, out of which the *fi. fa.* had issued, by which the present plaintiff, who had claimed the goods when seized under the *fi. fa.*, was barred from prosecuting any claim to the goods against the sheriff or his officer, or against any person acting under or in aid of them: *Held*, that the order, though valid so far as respects the sheriff and his officer, could not be a protection to the execution debtor.

Park v. Taylor, 414.

MAGISTRATE.

Case.] After a conviction by a magistrate is quashed, *case* will not lie against him, unless the acts complained of be proved to have been committed by him without any reasonable or probable cause, and maliciously: and the question of malice must be left to the jury.

Burney v. Gorham, 358.

MARMORA FOUNDRY COMPANY.

Action for calls under the statute 1 Wm. IV. ch. 12, against the defendant as one of the stockholders: *Held per Cur.*, that stockholders in the said corporation are admissible as witnesses for the plaintiffs, under the statute 12 Vic. ch. 70; that proof of a conveyance of Hetherington's interest in the Marmora Iron Works was not required under any of the issues; that the said act is not obsolete for non-user; that the clauses of the said act requiring the books of subscription to be opened within two months is only directory; that the subscription books subsequently opened may be considered as in connexion with the subscription books previously opened, and that all the proceedings from the be-

ginning may be taken together in connection with or relation to the object ; that the omission of Hetherington's name in the new subscription books (he being dead), does not render the proceedings of the company invalid, nor is it fatal to the plaintiffs in this action; that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the act of incorporation, is sufficient; that the names of the petitioners in the said act named, need not necessarily be signed to the new subscription books ; that the defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock book of the company.

Marmora Foundry Company
v. Murney, 29.

PLEADING.

Award—Pleading.] Debt on bond. The defendant set out the condition of the bond on oyer, which was for the performance of the award of arbitrators, to whom it was referred by the plaintiff and the defendant to "arbitrate, award, order, judge and determine upon and concerning the possession" of a certain specified lot of land and premises, "and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, quarrels, controversies, trespasses, damages and demands whatsoever, at any time theretofore had, made, moved, done, suffered, committed, or depending by or between the said parties, or by reason of any other matter, cause or thing, from the

beginning of the world to the day of the date of the said bond,"—and pleaded "no award made."

The plaintiff replied, shewing an award made by the arbitrators at the proper time, and with the proper formalities "that the said plaintiff should pay or cause to be paid to the representatives of the said Andrew P. Shorts, deceased, within one month from the date of the said award, the amount due on certain notes of hand given by plaintiff to the said Shorts in payment of the land in the condition of the bond mentioned,—and that the defendant should give or cause to be given to the plaintiff or his representatives, on payment of the said notes, a good and sufficient deed in fee simple for said land ; and that defendant should not transfer the said notes within the said month; and that the bond for a deed given by the said Shorts to the plaintiff, should be delivered by the defendant to the plaintiff." The plaintiff then averred notice by the defendant of the award, and assigned two breaches : 1st—that the plaintiff, in pursuance of the terms of the award, tendered to the defendant, who then was the holder of the said notes of hand, and to the defendant's wife, the executrix and representative of the estate of Shorts, the full amount of principal and interest due upon the notes, and demanded a deed of the land, but that they refused to accept the money and the defendant refused to give the deed, although a reasonable time had elapsed ; 2nd—that after the tender and refusal in the first breach mentioned, and before suit, to wit, &c., the plaintiff requested the defendant to deliver to plaintiff the bond for a deed in the award mentioned, and although a reason-

able time, &c., had elapsed, defendant did not nor would deliver the said bond: verification.

The defendant rejoined, setting out the award *verbatim*, and then demurred by separate and distinct demurrers to each of the two breaches, assigning several grounds of demurrer to each breach: joiner in demurrer. *Held per Cur.* (McLean, J., *dubitante* on the first point), that under the *general words* of the submission, authority was given to arbitrate as to the fee simple of the land, if it were a matter in difference between the parties, which must be presumed. 2ndly, That the award was void for not deciding upon the matter expressly submitted to the arbitrators respecting the *possession*.

Held also, that the defendant could not, by thus setting out the award in his demurrer by suggestion, make it a part of the plaintiffs replication, as in the case of a deed pleaded with proferet; and that the defendant's demurrer should have been—to the replication, and not to the several breaches assigned in the replication. But, upon the whole record, judgment was given for the defendant on the demurrer, because the award, as set out by the plaintiff himself in this replication, was void.

Benedict v. Parks, 370.

Express or implied promise.]

2. In an action of assumpsit against the defendant as administrator, &c., the first count of the declaration stated that the defendant's intestate endorsed a promissory note (which was set out), and that after endorsement and before the note became payable, the intestate died. The count shewed a due presentment of the note, which was payable at a particular place; and averred in excuse for

the omission of notice of non-payment, that "at the time the said note became due, no letters of administration to the estate and effects" of the intestate "had been granted to any person, nor had any person administered thereto."—There were other counts in the declaration, and it concluded with an averment that "afterwards, &c. the defendant, as administrator as aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said several moneys on request: *Held*, that the plaintiff was entitled to judgment; for that, assuming the above excuse for the omission of notice of dishonor to be insufficient, the promise alleged must be taken to be an express promise, and was supported by a sufficient consideration. *Semble*, the matter of excuse was insufficient.

Brown v. Marsh., Administ., 438.

Express or implied promise.]

3. Assumpsit against an administrator upon a promissory note drawn by his intestate, who died before the note fell due. The count, after averring a due presentment and non-payment, continued, "of all which *due notice* was given by placing a notice of non-payment in the post office of the City of Toronto, (being the place mentioned in the said promissory note where the same was payable,) directed to" the intestate "at Richmond Hill, being the place where before and until his death, he resided, and being his last place of residence." The plaintiffs further shewed that administration of the goods, &c., was afterwards granted to the defendant, and stated a resulting legal liability on the defendant's part, as administrator, concluding with an averment that the defendant, "in consideration

thereof, *then* promised plaintiffs to pay them the amount of the said note on request." The defendant demurred specially to the declaration, on the ground that no notice of non-payment, or sufficient excuse for the omission of it, was averred. *Judgment* was given for the plaintiffs on the demurrer; for upon the assumption that the averments in the declaration as to notice were insufficient, the promise of the defendant, which must be taken to have been an express promise, was nevertheless, in the absence of any notice, supported by a good consideration, and bound him as administrator.

Gillespie et al. v. Marsh, Adr., 453.

Judgment non obstante veredicto.] 4. In an action of covenant brought by James Phelan against the heir-at-law of John Phelan, on an agreement which was set out upon oyer, the breach assigned was, that neither the ancestor in his lifetime, nor the defendant since his death, although often requested, did or would give plaintiff a clear deed of said land. Defendant pleaded, secondly, non-payment of purchase money in agreement mentioned: verification. 3rdly, that no conveyance of the land had been tendered for execution to defendant or his ancestor: verification.

Replication to 2nd plea—that plaintiff was always ready and willing to pay the purchase money pursuant to the terms of the agreement: to the country, and issue.

To 3rd plea—that plaintiff did tender a conveyance to the ancestor in his lifetime, and to defendant since his death: to the country, and issue.

At the trial a verdict was rendered for defendant on the 2nd and 3rd issues.

Held, per Cur.—Judgment for plaintiff on the above issues, *non obstante veredicto*.

Sullivan, J., *dissentiente*, on the ground that the declaration was bad, as the breach assigned, that neither defendant nor his ancestor would give plaintiff a "clear deed of the said land," was not warranted by the terms of the agreement, and that no breach of that agreement was shewn.

Phelan v. Phelan, 275.

Lien.] 5. A lien may be specially pleaded in an action of detinue.

Riordan et al. v. Brown, 199.

Note taken.] 6. Assumpsit on a promissory note, payee against the maker, for 75*l*. Plea—That, as to 50*l*., parcel of the note declared on, defendant, before the note became due, made a promissory note for and on account of the sum of 50*l*., parcel, &c., payable three months after date, to the plaintiffs or order, which the plaintiffs then accepted and received for and on account, &c.; that there was no other consideration for the note of 50*l*., and that before it became due it was endorsed by the plaintiffs to one McLaren; and the same note and the note mentioned in the declaration were at the commencement of this suit, outstanding against the defendant. Replication—That the note for 50*l*. became due and payable before the commencement of this suit; but the defendant did not at any time pay the amount, or any part thereof; and that plaintiffs, before and at the commencement of this suit, held and now hold the said note unpaid and unsatisfied. Replication held bad on special demurrer.

Thompson et ux. v. Wilson, 57.

Pleading in abatement—Certainty.] 7. A plea in abatement of another action pending, which alleged that before the issuing of the writ in the action pleaded to, or before the plaintiff's declaring therein, he issued the writ in the action alleged to be pending, held bad for not shewing with sufficient certainty, that the action alleged to be pending had been commenced, when the writ in the action pleaded to was sued out.

A plea in abatement of another action pending, ought to pray judgment both of the writ and declaration; and where such a plea in its commencement prayed judgment of the writ only, and in its conclusion both of the writ and declaration, it was held bad for inconsistency.

Although a plea in abatement need not be demurred to specially, yet, all objections intended to be urged must be noted on the margin of the demurrer book, pursuant to the rule of court.

March v. Burns, 344.

Replevin.] 8. Defendant well avows the taking, &c.; because he says that before and at said time when, &c., plaintiff held said premises as tenant thereof to defendant, under a demise theretofore made by one L. to one K. for five years, at the yearly rent of 4*l.* 10*s.*; and that, plaintiff being assignee of all the term of K., defendant, before any rent became due, and after demise to K., became assignee of all the estate, right and title of L. in or to said premises; and because 13*l.* of rent aforesaid, for three years of term aforesaid, was due, defendant, at said time when, &c., seized, &c.

To this avowry plaintiff pleads that said L., when he assigned to defendant, had not, nor had defen-

dant, at any time, any reversionary interest in said premises.

Demurrer to this plea: cause assigned, that plaintiff does not shew how or when the reversionary interest of L. had ceased, or in whom such reversion was vested.

Held, per Cur.—First, that the avowry, if specially demurred to, could not be sustained, because it did not set out defendant's title; secondly, that the plea was insufficient, for the cause assigned.

Lynett v. Parkinson, 95.

Trespass.] 9. 3rd plea: that before the said time, when, &c., defendant was seized of the goods, &c., in declaration mentioned, and being desirous of selling the same, plaintiff did falsely and fraudulently represent to defendant that he would purchase the same on credit, and agreed to secure the payment to defendant by a bill of sale of said goods, to be subject to a proviso for making void the same upon payment to defendant; and that plaintiff, having obtained possession of said goods, refused to pay defendant for the same, or to give him a bill of sale thereof; and that defendant, having discovered such fraud, did seize and take the said goods, and retained possession thereof as of his own property.

4th plea: that after the accruing, &c., defendant delivered to plaintiff and plaintiff accepted and received from defendant certain goods, being the goods, &c., in declaration mentioned, in full satisfaction, &c.: verification.

Held, that the 3rd plea was bad, as amounting to an argumentative denial that plaintiff was possessed as of his own property; and 4th plea bad, not only for want of a proper commencement

and conclusion, but also in the matter of it.

Hall v. Scarlett, 354.

Trespas.—Pleading.] 10. A declaration in trespass stated that before the trespasses, one T. B. O. was seized in fee of the close in which, &c., and in consideration of 125*l.* bargained and sold it to the plaintiff in fee simple, and afterwards died, leaving the defendant his heir-at-law, who at the time when, &c., had no title or color of title to the close, excepting as heir-at-law of the said T. B. O. as aforesaid. The count went on to state that after the death of T. B. O., and while the close remained the close of the plaintiff as above, the defendant broke and entered, &c. The defendant pleaded "not possessed," and that "the close was not the close of the plaintiff." *Held*, on special demurrer, that both the pleas were good.

The declaration also contained a count for an assault and battery, to which the defendant pleaded a prosecution before magistrates for the same assault, in the form given in 3 Chit Plead. 7th ed. 332-3. The plea described the statute giving the magistrate jurisdiction, as passed in the fourth and fifth years of the reign of Queen Victoria. *Held*, upon special demurrer, that the plea was bad for so describing the statute.

Johnstone v. Odell, 395.

Trespas.] 11. In trespass, where the entry is laid on a day certain with a *continuando*, the plaintiff, under the plea of *not guilty*, is prevented from proving a trespass at an earlier period with a *continuando*, though he may waive the time laid, and recover for a single act of trespass at a more remote period.

Fairman v. Fairman, 435.

Assumpsit on a promissory note made by the defendant's testator.]

12. The declaration stated that the testator—to wit, on the 19th February 1847—made his promissory note for 860*l.*, payable to Daniel Cleal or order, and delivered it to Daniel Cleal, who then endorsed the same to the plaintiff; "that after the making, and before the note fell due, testator died, whereby defendants, as executrix and executor, became liable to pay the amount, according to the tenor and effect of the note—concluding with a promise by the defendants, as executrix and executor, to pay the plaintiff.

The defendants pleaded, 2ndly, That defendants did not promise in manner and form, &c.; concluding to the country.

3rdly. That the note was made for the accommodation of Daniel Cleal, without consideration, and that the endorsement by Daniel Cleal to the plaintiff was without consideration, and that the plaintiff had always held the same without any value or consideration: verification. 4thly, The same as the third plea, with an averment that the endorsement to the plaintiff was after the note had fallen due. 5thly, That the note was procured by fraud of the payees and others, and that it was endorsed to the plaintiff with knowledge of the fraud: verification. 6thly, The same as the 5th plea, with an averment that the endorsement to the plaintiff was after the note had become due—verification.

Replication to all the above pleas—in estoppel: that after the note fell due, the plaintiff, the defendants and other named parties, between whom there were differences as to the liability of the defendants as executors, &c., to pay

the note, and as to the rights of the several parties thereto, by an instrument under seal, referred it to the award of certain arbitrators, to "decree to whom the said promissory note then of right belonged either in whole or in part, *and by whom the said note was to be held*, and whether the same or any part thereof, was then a binding contract or liability against the estate of the said testator in favor of any and what persons." A verment—that the arbitrators, in pursuance of the submission, made an award within the proper time in that behalf, and awarded "that the said promissory note was a good and valid note and a binding contract and liability against the estate of the said testator, and that the same and the proceeds thereof belonged as follows—that is to say, part thereof, to wit 15*l.*, to the late firm of Daniel Cleal & Co., being composed of Daniel Cleal and one Nathaniel Reid, and the remainder of the said note belonged to the said plaintiff." The replication further averred that the defendants appeared by council before the arbitrators; that all the several defences in the above pleas, existed (if they ever did exist) before the submission; and that the plaintiff, before the making of the submission, was and ever since had been the holder of the note—verification: conclusion in estoppel.

Special demurrer to the replication.

Held, That the replication was bad, as the matter of it did not estop the defendants as to the second plea, and because it did not appear on the face of the submission or of the award, that the plaintiff at the time of the reference and of the making of the

award, was the holder of the note; and *Seemle*, the award was void for not determining all the matters submitted.

Cleal v. Elliot et al. Ex'ors., 252.

PROMISSORY NOTE.

Indemnity—Contribution.] 1.

A. and B. gave a joint and several promissory note to C., who endorsed it to D.; B. signing as surety for A., who promised to indemnify B. against the payment thereof, and an action was brought by the holder against A. B. & C. for the amount of the note, which was paid by B., together with the costs of suit. In an action brought by B. against A. for contribution, *Held*, that B. was entitled to recover the amount of debt paid by him, being a mere surety, and also a moiety of the costs, as jointly liable.

Blake v. Harvey, 417.

Certificate of Notary.] 2. The certificate of a notary on the adjoining half sheet of the protest, that he had served on the endorser a notice of non-payment of the note protested upon, is sufficient evidence of notice to the endorser of non-payment thereof.

A protest without seal is admissible as evidence of the facts therein contained, under the statute 13 & 14 Vic. ch. 23, sec. 6.

Russell v. Crofton, 428.

Assumpsit on the undermentioned promissory note, and on the account stated—Plea, set-off.] 3.

The plaintiff sued on a promissory note for 37*l.* 10*s.* At the trial, B. the defendant, produced an account for 20*l.* 16*s.* 3*d.*, commencing in September 1848, and ending January 1850. The defendant also proved a receipt for 12*l.* 10*s.* The plaintiff then put in an annuity bond conditioned

for the payment by the defendant to plaintiff, of 25*l.* per annum during his life, the first payment to be made on or before the 1st of June, 1846, and the like sum on the 1st of June in each succeeding year; a witness present proved the payment of the annuity for 1848, and that it consisted of items of an account, and was endorsed on the bond as one sum of 25*l.*; this evidence was objected to by the defendant's counsel, but admitted. The learned Judge of the County Court who tried the cause, told the jury, "that from the evidence it appeared that more than 25*l.* was due on the annuity bond, when the defendant's account was read over to the plaintiff; and that if, in their opinion, the amount thereof was intended as a payment of so much on the annuity, the plaintiff had a right so to apply it, and in that case, not to allow credit for it against the note; but to deduct it, if they thought there was no such understanding. As to the 12*l.* 10*s.*, that the plaintiff had endorsed it on the bond, and had a right to do so at any time; and that although it appeared to have been very recently done, that would make no difference." The jury found for the plaintiff the full amount of the note and interest. The defendant's counsel afterwards moved to set aside the verdict in the court below, as being contrary to law and evidence, the admission of improper evidence, and for misdirection, and the learned judge refused the application. *Held*, in appeal—That the learned judge was not in error in leaving the case to the jury on the evidence as he did, and that the conclusions arrived at by the jury in relation thereto were right.

Miller v. Miller, 240.

Notice of Dishonor.] 4. Plaintiff and defendant resided at about three miles distance from each other: the mail ran between both places, and closed where plaintiff resided on Monday, Wednesday and Friday in each week; the bill declared upon was presented for payment on Monday the 4th, being the last day of grace, and not paid; there being no mail on the 5th, notice was served on defendant by a special messenger on the 6th, before it could have reached him had it been mailed on that day: *Held*, that the notice served on the 6th was in good time.

Chapman v. Bishop et al., 432.

SHERIFF.

False return.] The defendant in this suit, as sheriff, by his deputy having levied under a *fi. fa.* on twenty-five shares of the stock of the Bond Head Harbour Company, in the books of the said company appearing to be the property of W. H. B., and having written to the plaintiff in this suit to say that he had done so, afterwards returned the writ *nulla bona*: *Held*, that the said shares not having been transferred in the registry books of the company kept for that purpose, were at the time of the said levy at the order and disposition of the said W. H. B., and liable to execution as being his property, and did not pass to the trustees of the said W. H. B. under a deed of assignment to them, sixteen shares of the stock of the Bond Head Harbour Company being specified in the second schedule attached to said deed, and a clause being at the bottom in these words—"and all other goods, chattels and personal estate of the said W. H. B., wheresoever situate."

Held also, that the said Bond Head Harbour Company stock was personal property of the debtor, and liable to be seized and sold under an execution against him, and therefore that the return made by the sheriff was untrue.

Brock v. Ruttan, 218.

Trespas.] 2. A. having certain goods on hire for a term, belonging to B., and the defendant as sheriff having notice that the goods were the property of B., sold them under an execution against A. *Held*, that B. could maintain an action against the sheriff, the sale by him, and subsequent sale by his vendees being a complete conversion, although the goods were afterwards left in A.'s possession.

The declaration contained two counts: the first stated that the plaintiff was owner of certain goods which were let to hire to A. for a term unexpired; that the defendant, intending, &c., while the goods were in the possession of A., and the reversionary interest therein remained in the plaintiff, seized the goods and absolutely sold the same and converted and disposed thereof to his own use. 2nd count in trover. *Held*, that the first count was good, and that there was no misjoinder.

Morrison v. Carrall, 226.

SUBPŒNA.

B. having been served at Niagara with a subpœna issued by the clerk of Assize and Nisi Prius, commanding his attendance at the assizes then sitting at Toronto, the subpœna having been tested on the 22nd of May, and commanding his attendance on the 6th of the same month of May: *Held*—1st, That the subpœna was invalid on the face of it, in being tested

and served on a day after that on which the defendant was ordered to attend; and 2nd, that a subpœna issued by the Court of Nisi Prius, which is of local jurisdiction, is not binding out of the county where the court from which it issued is then sitting.

Grantham v. Bishop, 237.

SURETY.

Release of.] In an action on a bond made by A. to the Queen, as surety for B., who was appointed treasurer of the Western district, under the statute 4 & 5 Vic. ch. 10, sec. 29, and continued in office under that statute until he was reappointed treasurer by the municipal council under the statute 9 Vic. ch. 40, secs. 7 & 8, which altered the mode of electing such treasurer: *Held*, that A. was not liable for any defalcations made by B. after his re-election by the municipal council under the statute 9 Vic. ch. 40, secs. 7 & 8, and that the bond given by A. ceased to be a security for anything done after that period.

The Queen v. Hall, 406.

TRESPASS.

Power of Crown to convey—Right of Fishery, &c.] In an action of trespass for entering the plaintiff's close, and digging post holes, and building a shanty, &c., and occupying the beach for the purpose of fishing: *Held*, that the Crown has the power to grant the beach to high water mark, and that the plaintiff was a trespasser, the patent having conveyed to the plaintiff, the land to the waters of Lake Ontario. *Held also*, that no common law right exists to the public to use the beach above high water mark, for the purposes of fishing, when the beach has been

conveyed by the Crown to a subject.

Parker and wife v. Elliot, 470.

Arrest.] 2. The defendant in this suit, living in the county of York, received an anonymous letter dated 6th May, 1850, posted at Adolphustown, the place of residence of the plaintiff in this suit, informing him that the plaintiff had sold out and was going to leave the country in five or six weeks. The defendant, on the 24th June, 1850, without apparently making any enquiries in the meantime, arrested the plaintiff on a *capias ad respondendum*: *Held*, that the defendant had not good reason to believe, &c.

Ruttan v. Pringle, 244.

VESSEL.

Repairs—Liability of joint owners.] Where the plaintiff, at the request of A., the managing owner of a vessel, did certain repairs on the vessel, at the time not knowing that the vessel was owned by A. jointly with others: *Held*, that all the owners were

jointly liable to the plaintiff for the said repairs.

Harrison v. Harris et al., 235.

REPLEVIN.

(OMITTED.)

Fraud.] A. was in possession of the premises in question, without title thereto. B. came to him and represented himself as owner of said premises when in fact he was not A. by writing. agreed to lease from B. for five years, at a rental of 4*l.* 10*s.* This writing was signed by A. alone.

Held, That under the circumstances, A. could dispute B.'s title to said premises, on the grounds of fraud and misrepresentation.

Held also, in such a case when the jury found for the plaintiff upon a special plea setting up fraud in procuring such lease to be signed, and also for the defendant upon the issues of *non tenuit*, that the defendant was not entitled to judgment *non obstante*.

Held also, that when upon some of the issues, the jury had found no verdict, a new trial should be granted without costs.

Lynett v. Parkinson, 144.



